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No. ____

IN THE

Supreme Court of the United States

LEWIS PERDUE,

Petitioner,

—v.—

DAN BROWN and RANDOM HOUSE, INC., IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When deciding whether part of a literary work is "substantially similar" to protected expression in a previously copyrighted literary work, should a court look to the two works alone, or should it also consider expert affidavits?

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JURISDICTION

The district court had exclusive copyright jurisdiction pursuant to 28 U.S.C. § 1338. This Court has jurisdiction under 28 U.S.C. § 1254. The Court of Appeals for the Second Circuit entered its decision on April 18, 2006. Circuit Justice Ruth B. Ginsburg extended the time to file a Petition for Writ of Certiorari to August 15, 2006. This Petition is filed on August 8, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. I, § 8, cl. 8:

> The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

17 U.S.C. § 102:

> (a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . . Works of authorship include the following categories:
>
> (1) literary works . . .
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea . . . .

Federal Rule of Civil Procedure 56. Summary Judgment:

> (c) . . . The judgment sought shall be rendered forthwith if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> . . .
>
> (e) . . . Supporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence.
>
> . . .

Federal Rule of Evidence 702. Testimony by Experts

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . .

Federal Rule of Evidence 704. Opinion on Ultimate Issue

> (a) . . . testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

STATEMENT OF THE CASE

The federal copyright law question presented here divides the Circuits. Because of different rules concerning the admission of expert testimony, a victim of

infringement in Los Angeles can use expert testimony in federal court to support his claims on a certain element of copyright infringement, but a victim in New York may not. This Court should grant review to eliminate that disparity and to ensure uniformity in American copyright law. Then it should order that the case be remanded for further proceedings on the merits.

This case concerns the copying of a plot and other details from an original work, which is protected by 17 U.S.C. § 102(a)(1). This kind of copyright violation is what a leading treatise calls "nonliteral similarity," which can either be "comprehensive" or "fragmented." M. Nimmer and D. Nimmer, COPYRIGHT, § 13.03[A][1] (2005). As the district court recognized, copyright "protection covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of characters." Petn. App. 19a, *quoting* Z. Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 515 (1945). *See also Feist Publication, Inc. v. Rural Telephone Service*, 499 U.S. 340, 348 (1991) ("minimal degree of creativity" in selection, coordination or arrangement of facts would be protected).

The claim is not that the original work was copied word-for-word. Rather, it is that the infringing work misappropriated not only the uncopyrightable idea of the original book, 17 U.S.C. § 102(b), but also the expression of that idea in a detailed plot, including the sequence of events, characters, motivations, and fictitious history and theology. The existence of dissimilarities does not automatically "relieve the infringer of liability as 'no copier may defend an act of plagiarism by pointing out how much of the copy he has not pirated.' " Petn. App. 20a, *quoting Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992). Similarly, the jury may take into account the

degree of contribution the original work made to the infringing work when fixing damages for copyright infringement. 17 U.S.C. § 504(b).

Proceedings. In 2000, Lewis Perdue authored a book, DAUGHTER OF GOD. Respondents conceded for purposes of their summary judgment motion that Dan Brown used DAUGHTER to construct his subsequent 2003 best-seller, THE DAVINCI CODE. Cir. App. 388.[1] The question is whether what Brown took is substantially similar to the protected elements of what Perdue originally wrote, including the details of his plot.

For example, both books turn on a fictional allegation that the Emperor Constantine and then the Catholic Church suppressed physical evidence of the "divine feminine." In both, there is a multiple party race to find this evidence. The common contenders are not only the protagonists, but also a conservative organization affiliated with the Catholic Church, and those who wish to use the evidence to discredit or blackmail the church. In both, the parties find some evidence, but at the end do not have the critical evidence. In Perdue's book, the divine feminine is represented by a fictional 4th Century female messiah named Sophia. In Brown's book, the divine feminine is represented by Mary Magdalene, whose story Brown copied from yet another book, HOLY BLOOD, HOLY GRAIL.[2]

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[1] In this Petition, "Cir. App." means the parties' Appendix submitted to the United States Court of Appeals for the Second Circuit.

[2] In a London suit by two of the authors of HOLY BLOOD, HOLY GRAIL, the court found that Brown had copied the Mary Magdalene-Priory of Sion story from that book. More precisely, the court found that Brown did no research but instead worked from a synopsis and other materials provided by his wife which copied from that book. The court nevertheless held for Random House (Brown's publisher) because i) Brown's character in the novel refers to HOLY BLOOD, HOLY GRAIL, ii) the copied material was mostly factual, and

Perdue's readers began emailing him about the similarities immediately after publication of DAVINCI.[3] He complained to Random House. Eventually Brown and Random House sued him in the Southern District of New York and sought a declaration that they had not violated Perdue's copyright. Perdue filed a counterclaim which brought in the companies involved in making the DAVINCI movie, who are also respondents.

In general, proof of infringement requires proof that the infringer in fact copied the original work, and that the copying is actionable because the infringing part is "substantially similar" to the protectible elements of the original work. Nimmer, *supra*, at § 13.01[B]. In the Second Circuit, the first element of actual use is called "access," which may be proven by either direct proof of copying or expert testimony concerning "probative similarity" of the two works. Petn. App.18a.

Random House and the other respondents moved for summary judgment, and, for the purpose of that motion, confessed access, or actual use.

Random House agreed that the test for actionable copying then turns on whether there is "substantial similarity" between the two works. Cir. App. 388. In the Second Circuit, "substantial similarity" depends on the viewpoint of the "average lay observer" as determined from the language of the works themselves. Petn. App. 18a. Because only the language of the books is considered relevant, the Circuit classifies all other evidence as

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iii) the earlier book presented the facts in chronological order, which showed no unique "architecture." *Baigent v. The Random House Group Limited*, [2006] EWHC 719 (Ch), 2006 WL 1020604, ¶¶ 194, 204, 215, 218, 221, 273, 297, 306-07, 315, 343, 348. The English Court of Appeal has granted Baigent leave to appeal.

[3] Brown also borrowed to a lesser degree from Perdue's 1983 book, THE DAVINCI LEGACY. *See* n. 6, *infra*.

being irrelevant. *See* pp. 14-15, *infra*. Therefore, although Perdue filed a Fed.R.Civ.P. 56(f) affidavit and sought discovery, the district court disregarded the request.

Random House offered no evidence to support its motion other than attorney affidavits which attached the books in question and portions of a few other books on subjects common to the novels. Cir. App. 99-121, 370-382.

In opposition, Perdue filed evidentiary affidavits. Two were Perdue's and two were from experts, one literary expert and the other forensic linguist. The district court refused to consider them. Petn. App. 18a. It said:

> In support of his claims of substantial similarity, Perdue also submits declarations from John Gabriel Olsson, a specialist in forensic linguistics and Gary Goshgarian, a professor of English at Northeastern University. However, because substantial similarity is judged by the spontaneous response of the ordinary lay observer, expert analysis of the similarities between the two works is not determinative. *See Denker v. Uhry*, 820 F.Supp. 722, 729 (S.D.N.Y. Dec. 8, 1992) (finding expert testimony unnecessary to assess substantial similarity if the proferred testimony does not deal with evidence or material that might help gauge the response of the lay reader).

Id. The district court held that no reasonable juror could find that the protected parts of DAUGHTER were "substantially similar" to the parallel parts of DAVINCI. Petn. App. 35a. In its findings the court "filtered out" certain elements of the plot. In doing so, it applied its own beliefs concerning such matters as what was or was not a historical fact, or "original in the genre," or a stock theme, or a stock device necessary to a particular theme,

sometimes called a *scene a faire* ("scene which must be done"). Petn. App. 22a-25a. For example, the court dismissed 28 similarities between the books as "unprotectible ideas, historical facts and general themes." Petn. App. 22a.

After eliminating these similarities, it then examined such matters as the "thematic expression," the book's "total concept and feel," plots, and characters, as well as "sequence, pace, and setting," all of which it found dissimilar. Petn. App. 25a-33a.

Perdue appealed the rejection of his affidavits.[4] The Second Circuit, in a brief per curiam opinion, affirmed the "decision below for substantially the reasons given by the district court." Petn. App. 5a.

What the affidavits said. The district court's ruling did not depend solely on the works themselves, but rather turned on numerous assumptions concerning both history and literature. But the affidavits contradicted the Court's assumptions about history, about literature, about the genre, and about which scenes and devices were "stock." If the affidavits had been admitted, genuine issues of material fact would have required that the case be sent to a jury, which is the body to decide disputed copyright infringement cases. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 351-53 (1998) (Seventh Amendment right to jury trial even on statutory damages).

Gary Goshgarian, who authored one affidavit, is a professor of English at Northeastern University. He has published several novels, teaches detective fiction, and belongs to several associations of mystery writers. Cir. App. 294-295.

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[4] *See* Brief of Defendant-CounterClaimant Appellant 21, 29, 34-37; Reply Brief of Defendant-CounterClaimant-Appellant 26-33. These are briefs Perdue filed in the Second Circuit.

John Gabriel Olsson, who authored the other, specializes in forensic linguistics and has written a textbook on that subject. Cir. App. 309. After 13 pages of analysis, he concluded that "the evidence of infringement is overwhelming." Cir. App. 322. The affiants provided evidence that should have prevailed over the district court's surmise on a number of important points.

Elements are Fiction, Not Fact. An important element in each book is that the Catholic Church, beginning with Emperor Constantine and the Nicean conference in 325 A.D., made Christianity an exclusively male religion. The district court read an ambiguous statement in Perdue's fiction in the light most *un*favorable to Perdue and treated this as *fact*. Petn. App. 24a.

But affidavit evidence says Perdue invented the fictional flesh-and-blood Sophia as well as her persecution by Constantine. In truth, Constantine had nothing significant to do with the role of women in the church, and, neither did the Nicean conference. Cir. App. 211, 214-215, 218-219. *See also* Cir. App. 107, 109-110 (Gnostic gospels mentioning women were rejected before 200 A.D.); Cir. App. 379 (Nicean conference discussed priestly celibacy, but reached no conclusion). Perdue invented Constantine's demonization of the sacred feminine, and Brown copied him.

Similarities not "stock". Professor Goshgarian, an expert on mystery fiction, said that the similarities between the two books were "not stock and are non-generic." Cir. App. 296. He added that, to his knowledge *only two* mystery thrillers have the theme that evidence of the divine feminine exists which is a threat to the Catholic church, and that they are DAUGHTER and DAVINCI.[5] *Id.* This contradicts the district court's finding

[5] He added that one other novel portrays Jesus returning as a woman at the resurrection.

that the books' themes were to be expected in a "mystery thriller set against a religious backdrop." Petn. App. 22a.

According to Goshgarian, the following similarities between the two books are not "stock" or "generic" to the thriller genre and even the stock elements are in a particular sequence. He begins with the unique "threat to the church" nature of the two novels. Then he notes that:

* While thrillers often begin with murders, the similarities between the two novels are "not stock and are non-generic." Cir. App. 296. In both, an older art expert has a church-shaking theological secret. Just before being gruesomely murdered, he gives clues to a younger heroine. She is led to a painting originally painted on wood, which physically contains a gold key. The keys begin the book-long quest to discover a truth hidden for centuries which, if revealed, could topple the Catholic Church.

* Both keys are gold, do not actually turn a lock, and are imprinted with a symbol. Both paintings are named for the Madonna—"Madonna of the Rocks" and "Home of Our Lady of the Redeemer."

* Swiss banks are stock venues in thrillers. However, the sequence of events is unfamiliar and "suspiciously similar." Cir. App. 297. In both books, the key leads to a Zurich bank where a safe deposit box contains another locked container which holds physical evidence regarding the sacred feminine. *Id.* The hero has been accused of murder, and so the protagonists must break out of the bank to escape death or capture. *Id.*

The bank scene to which the affidavit refers illustrates Brown's "reworking technique":

> DAUGHTER, [308].
>
> [Ridgeway] and Zoe looked silently about them. The room was the size of a luxury hotel room and

> furnished in much the same way. . . [Ridgeway] went to the wet bar, set the wrapped painting down on the counter, and filled a tumbler with water from a chilled bottle of Perrier.
>
> DAVINCI, [194-196].
>
> Langdon and Sophie stepped into another world. The small room before them looked like a lavish sitting room at a fine hotel. . . . On the broad desk in the middle of the room, two crystal glasses sat beside an opened bottle of Perrier, its bubbles still fizzing.

* Both books focus on evidence that shows a cover-up which could topple Christendom.

* The relics are similar (a shroud, a tomb) and in both novels are either lost or not found, which maintains the stability of the church.

* In both novels, the protagonists are opposed by representatives of secretive religious organizations. Cir. App. 297.

Selection, coordination, and arrangement. These factors, taken from *Feist*, make up what the Second Circuit calls a "total concept and feel" case. Petn. App. 28.

Professor Olsson's linguistic analysis says that 65% of the 100 similarities between the two books are in the same sequential order and are "striking." He identified several important similarities and showed how all but one of them appeared at virtually the same places in the two books. Cir. App. 312. They are, with DAUGHTER and DAVINCI pages given respectively:

> The opening murder of the art expert (11,15).
>
> The hero and the expert are acquainted (15, 22).

The existence of the secret documents or evidence (175, 158).

The "explosive" secret of the divine feminine (226, 239).

Hero is accused of having committed murder (260, 47).[6]

Characters. Linguist Olsson's affidavit lists the similarities between the characters:

* Male protagonist—late 30's to 40's, claustrophobic professor of comparative religion or religious symbology who is an expert on Constantine and is "captivating".

* Female protagonist—art broker or has an intense art interest, raised by artistic male after family tragedy, younger than male protagonist, speaks two languages and is involved in law enforcement or forgery detection. Cir. App. 316.

* Character who befriends the protagonists but is really working, or is supposedly working, for an ambitious cardinal or bishop who wants the evidence to persuade the Vatican to make him Pope or to persuade it to fund his organization. Cir. App. 321 ("shapeshifter") (Stratton, Teabing).

These character similarities can be gained from the books themselves, but Olsson's affidavit makes comparison much easier because each book exceeds 400 pages in length. Also, another connection between the female protagonists cannot be found by analyzing the

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[6] On page 35 of both DAVINCI and Perdue's DAVINCI LEGACY (1983), the expert uses his own blood to write his last message on himself. This is not a separate claim, but is further evidence of copying. Brief of Defendant-CounterClaimant-Appellant p. 37.

two works. In DAUGHTER, Zoe is named for the daughter of the goddess mother of God in Gnostic literature, Sophia, Cir. App. 317, hence the title, "Daughter of God." In DAVINCI, the female protagonist is actually named Sophia, and she is described as a descendant of Jesus, i.e., another "daughter of God." Cir. App. 317.

In sum, the affidavits, based on knowledge of historical facts and literary expertise not found in the books, contradicted the district court's findings concerning both stock literary devices and historical facts. They pointed out connections based on the meaning of names that cannot be drawn from the books themselves. If admitted, they also would have significantly informed any attempt to compare the two books.

In reviewing a summary judgment motion, it is the district court's job to examine the evidence in the light most favorable to the non-moving party, *i.e.*, to Perdue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The question is whether, in that light, a reasonable juror could find that what Brown took is substantially similar to protected elements of the Perdue novel. If the affidavits are considered, there is more than enough evidence for a reasonable juror to reach that conclusion. If the affidavits are considered, they create numerous genuine issues of material fact that only a jury can resolve. Brown can argue that the district court's surmise is plausible, but he cannot argue that it is in agreement with the affidavits. *Metcalf v. Bochco*, 294 F.3d 1069, 1073 (9th Cir. 2002) (Kozinski, J.) (dispute over substantial similarity of TV plots should go to jury).

REASON FOR GRANTING THE PETITION

Despite, or perhaps because of, the simple language of the 1976 Copyright Act, the Circuits disagree about its interpretation, particularly when the "substantial similarity" of two works is in question. This Court has never spoken on these issues. Nimmer, *supra*, at § 13.03[E][1].

This Court should grant certiorari and resolve the conflict concerning the use of expert testimony, which is the distinction among the Circuits that is susceptible to a yes or no answer, is directly at issue in this case, and makes the most practical difference.

The Circuits are in conflict concerning the role of expert witnesses in applying the "substantial similarity" test.

The Circuits use a variety of tests to determine whether protected expression in an original work has been copied in a substantial way. One treatise describes the principle difference as follows:

> There are differences in how courts in the twelve federal circuits compare works in copyright infringement cases. Most courts use one of two tests: the copying/unlawful appropriation test associated with the Second Circuit or the extrinsic/intrinsic test associated with the Ninth Circuit.

R. Osterberg and E. Osterberg, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW § 3 (2005). *See also id.* at §§ 3.1-3:4 (describing differences in detail); Nimmer, *supra* at § 13.03[E][3] (describing different tests and different rules governing experts); *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312 (6th Cir. 2004), *cert. denied*, 543 U.S. 959 (Boggs, J.) (fashioning Sixth Circuit rule out of different tests in other circuits); *Positive Black Talk, Inc. v.*

Cash Money Records, Inc., 394 F.3d 357, 374 n. 13 (5th Cir. 2004) (distinguishing Fifth Circuit test from Ninth Circuit test).

In this case, however, the relevant difference is whether a circuit will allow expert testimony on the issue of substantial similarity. More particularly, it is whether expert testimony may be used when determining which parts of the original work are "protectible," *i.e.* show originality and are not historical facts or stock scenes from a recognized literary genre. The "use of expert testimony in copyright cases has received widespread judicial attention." *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1300 (D.C. Cir. 2002). As the treatise again explains:

> Although some courts have considered expert opinions concerning whether the works are substantially similar, the majority rule is that expert testimony may not be considered with respect to substantial similarity because whether two works are substantially similar is to be determined by the fact finder without the aid of expert testimony.

Osterberg, *supra*, at § 16-4 (footnotes omitted). In more detail, these are rules of the various circuits:

No expert.

The Second Circuit allows expert testimony to prove copying, or "probative similarity," but, once some copying is conceded, it prohibits expert testimony to show works are "substantially similar," *i.e.*, that the copying was "unlawful." *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947). It developed this rule long before the adoption of the Federal Rules of Evidence, and in particular Rule 702 concerning experts. But it has steadfastly adhered to it even after the adoption of that rule. *Walker v. Time Life Films,*

Inc., 784 F.2d 44, 51 (2d Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986); *Computer Associates Int'l., Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992) (because test is lay observer test, expert testimony is "irrelevant").

The First Circuit follows the Second Circuit. *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 66 n. 11 (1st Cir. 2000), *cert. denied*, 531 U.S. 827 (2000) ("there should be no expert testimony to establish whether or not there was substantial similarity").

The Third Circuit agrees with them. *See Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 208 (3d Cir. 2005) (expert testimony on substantial similarity would be improper on remand); *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62 (3d Cir. 1978), *cert. denied*, 439 U.S. 880 (1978) (dictum).

Apparently, so does the Fifth. *Positive Black Talk, Inc., supra*; *Sahuc v. Tucker*, 300 F.Supp.2d 461, 465 n. 1 (E.D. La. 2004).

Both the Seventh Circuit, *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982), and the Court of Federal Claims, *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8, 18 (Ct. Cl. 2005), have said expert testimony is not admissible.

Expert allowed.

The Ninth Circuit permits expert testimony on the very matters on which the Second Circuit disallows it, "plot, themes, dialogue, mood, setting, pace, [characters], and sequence [of events]." *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990) (looking to expert testimony on plot). It considers these matters part of its "extrinsic" test. If the court finds that reasonable minds might differ on these elements, it sends the case to the jury, which also

considers an "intrinsic test," *i.e.*, whether an ordinary reasonable person would think there was enough similarity to support an infringement claim.[7] *Id.* at 1358. *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004) (reversing defense summary judgment because expert affidavit created disputed issue on stock elements); *Baxter v. MCA, Inc.*, 812 F.2d 421, 424 n. 2 (9th Cir. 1987), *cert. denied*, 484 U.S. 954 (1987) (reversing defense summary judgment and approving use of expert testimony on retrial); *Griffin v. J-Records*, 398 F.Supp.2d 1137, 1141 (E.D. Wash. 2005) (reliance on defense expert).

The Fourth Circuit also allows expert testimony on these subjects. *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 733, 736 (4th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990) (reversing summary judgment; expert testimony on pattern, theme, organization, as well as reaction of intended audience allowed).

The Sixth Circuit allows expert testimony concerning the "extrinsic" test, but has not adopted each detail of that test and has said it applies "a more stringent standard" concerning expert testimony. *Murray Hill Publications, Inc., supra*, at 318. *See also Kohus v. Mariol*, 328 F.3d 848, 857, 858 (6th Cir. 2003) (expert testimony required to inform jury under "intended audience" standard; lay audience needs "interpretational guidance"); *Stromback v. New Line Cinema*, 384 F.3d 283, 295 (6th Cir. 2004) (refusing to remand for expert discovery where lack of similarity obvious); *Tiseo Architects, Inc.*

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[7] Expert testimony is not technically admissible on the subjective "intrinsic test," but once there are disputed issues of fact on the "extrinsic" test, the case automatically goes to the jury on both tests. *See Shaw, supra*, 919 F.2d at 1359. As a result, expert testimony can create an issue of material fact requiring trial in these circuits, while it cannot in the "No expert" circuits. Because the affidavits here included material facts which the respondents did not admit, this case would have gone to the jury in the "Expert allowed" circuits.

v. SSOE, Inc., ___ F.Supp.2d ___, 2006 WL 1235164 at *5 (E.D. Mich. 2006) (reliance on expert to compare building plans).

The Eighth Circuit similarly uses the "extrinsic" test and "rel[ies] on expert testimony to conduct the extrinsic test." *Moore v. Columbia Pictures Industries, Inc.*, 972 F.2d 939, 945 (8th Cir. 1992) (relying on defense experts who compared expressive elements). *But see Rottlund Co. v. Pinnacle Corp.*, ___ F.3d ___, 2006 WL 1676883 at *4 (8th Cir. 2006) (scrambling the tests and, unlike any other court, refusing to allow expert testimony on the issue of copying).

The Tenth Circuit allows expert testimony on what is an expression and not just an idea, whether elements are "stock" or not, what is original, and what is similar. *Autoskill Inc. v. National Education Support Systems, Inc.*, 994 F.2d 1476, 1493-1497 & n. 25 (1993). In another case, it has said the ultimate issue is whether "the accused work is sufficiently similar that an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996).

The Eleventh Circuit also allows expert testimony as part of its substantial similarity test. *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1257 (11th Cir. 1999) (comparison of screenplays).

The bottom line is this: Stripped of the vagaries and phrasing of the various tests, the six circuits in the "No expert" group tell district courts to determine similarities in theme ("genre"), total concept and feel (selection, arrangement, coordination), plot (including stock devices and historical f[illegible]), character, pace and setting by themselves and forbi[illegible] expert testimony on those issues. That is what the district court did in this case.

But the six Circuits in the "Experts allowed" group look at the same things and allow expert testimony. *Shaw, supra*; *Swirsky, supra* (which elements are "stock" is a fact issue).

As this review shows, the "inquiry into improper appropriation, both at trial and on appeal, remains one of the most contentious (and, not coincidentally, least precisely delineated) exercises in all copyright law[.]" A. Hartnick, *Intellectual Property: Substantial Similarity—A New Resource*, 230 N.Y.L.J. 3 (Dec. 15, 2003) (reviewing Osterberg treatise).

The Circuits that exclude expert testimony obstruct the pursuit of truth, defy the applicable federal evidence rules, and rely on the odd notion that a judge or juror is just supposed to "know" whether a plot is unique, or a device is "stock," or whether a historical assertion is a "fact." There is no reason to assume the "ordinary observer" or even the ordinary judge knows about literary genres, or what devices are "stock" or what facts are historically true or not. Expert witnesses can provide that information. *See* Nimmer, *supra* at § 13.03[E][3][a] (it is "hardly reasonable to expect laymen" to decide what is protectible or not by themselves); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) (no prohibition against damage experts in copyright cases).

This Court should grant certiorari to resolve this Circuit conflict. The conflict is well-established, shows no sign of diminishing, and affects the outcome in any case in which "substantial similarity" is the sole issue. Only when this Court resolves this issue will the outcome of a federal Copyright Act case not depend upon the Circuit in which it is filed. Moreover, as this case illustrates, the ability of an alleged infringer to bring a declaratory judgment action in a friendly circuit creates a widespread opportunity for forum shopping. That makes the issue of

whether expert testimony will be heard dependent on who wins the race to which courthouse. Given the need for a single uniform copyright law, the forum shopping aspect further supports the need for review by this Court.

CONCLUSION

The law does not require literal copying where both a plot idea and the expression of that idea in the details of the plot have been copied. Perdue does not claim that his thriller, which ultimately has a conventional religious message, is identical to Brown's. But Brown's substantial "non-literal similarity" to Perdue's protected expression is enough to impose liability for the unjust conduct that occurred here when, as the expert affidavits demonstrate, Brown took substantial elements of Perdue's novel, appropriated them as his own, and profited greatly from doing so.

FOR THESE REASONS, this Court should grant a writ of certiorari, reverse the decision below, and remand for discovery and a trial on the merits of the case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 05-4840-cv

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 18th day of April, two thousand and six.

Present:

HON. RALPH K. WINTER,
HON. GUIDO CALABRESI,
HON. ROSEMARY S. POOLER,
Circuit Judges.

DAN BROWN AND RANDOM HOUSE, INC.,

Plaintiffs-Counter-Defendants-Appellees,

IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC., and COLUMBIA PICTURES INDUSTRIES, INC.,

Counter-Defendants-Appellees,

—v.—

LEWIS PERDUE,

Defendant-Counterclaimant-Appellant.

For Plaintiffs-Counter-Defendants-Appellees and Counter-Defendants-Appellees:

ELIZABETH A. MCNAMARA *of* Davis Wright Tremaine LLP (Linda Steinman and James Rosenfeld *of* Davis Wright Tremaine LLP, and Charles B. Ortner *of* Proskauer Rose LLP, *on the brief*), New York, N.Y.

For Defendant-Counterclaimant-Appellant:

DONALD N. DAVID of Cozen O'Connor, PC, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Daniels, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is **AFFIRMED.**

This appeal involves a copyright infringement action between Appellant Lewis Perdue (hereinafter "Appellant" or "Perdue"), author of two novels, *The Da Vinci Legacy* (1983) and *Daughter of God* (2000), and Appellees Dan Brown, Random House, Inc., and several associated entertainment companies (collectively "Appellees"), who respectively wrote, published, and made into a movie, the best-selling fiction novel *The Da Vinci Code* (2003).[1] After Appellant publicly alleged that Appellee Brown had, without permission, appropriated content from his two novels in creating *The Da Vinci Code,* Appellees filed suit against Perdue in federal court, seeking a declaratory judgment that they had not engaged in copyright infringement. Appellant promptly counterclaimed against Brown, his publisher, and the movie studios, seeking injunctive relief and $150 million in damages. In response to motions for judgment on the pleadings and summary judgment, the District Court for the Southern District of New York (Daniels, *J.)* ruled in Appellees' favor, granting declaratory relief to Appellees and dismissing all of Appellant's claims. We assume the parties' familiarity with the facts, procedural history, and scope of issues on appeal, which we reference only as necessary to explain our decision.[2]

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[1] On appeal to us, Appellant claims that *The Da Vinci Code* "plagiarized primarily" from *Daughter of God,* and, "to a lesser extent," from *The Da Vinci Legacy.* Appellant's brief does not, however, develop his allegation of copyright infringement on the basis of *The Da Vinci Legacy,* and both parties treat this claim as essentially abandoned. We therefore only consider Appellant's copyright infringement claim on the basis of *Daughter of God.*

[2] For a thorough summary of *Daughter of God* and *The Da Vinci Code* (which are the principal subjects of this litigation), *see Brown v. Perdue,* 2005 WL 1863673, No. 04 Civ. 7417 (GBD) (S.D.N.Y. Aug. 4, 2005).

We review *de novo* the district court's grant of summary judgment in favor of Appellees. *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1071 (2d Cir. 1992). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A court must decide if "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

To establish copyright infringement, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In the case before us, the parties do not dispute that Appellant obtained valid copyrights for his books. Appellant therefore needs only to demonstrate that Appellees copied original, constituent elements of his books. In the absence of direct evidence, copying may be established by showing "(a) that the defendant had access to the copyrighted work and (b) the substantial similarity of protectible material in the two works." *Kregos v. Associated Press*, 3 F.3d 656, 662 (2d Cir. 1993); *see also Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139 (2d Cir. 1992) (stating that a plaintiff must prove both "access and substantial similarity between the works" (internal quotation marks omitted)). For purposes of the summary judgment motion, Appellees have conceded that they had access to Perdue's books. This case therefore turns on the second part of the test: "whether, in the eyes of the average lay observer, *[The Da Vinci Code* is] substantially similar to the protectible expression in [*Daughter of God*]." *Williams v. Crichton*, 84 F.3d 501, 581, 587 (2d Cir. 1996).

In the case before us, the district court first distinguished between noncopyrightable and copyrightable work, following "a principle fundamental to copyright law," that "a copyright does not protect an idea, but only the expression of an idea." *Kregos*, 3 F.3d at 663 (internal citation omitted); *see also Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 239-40 (2d Cir. 1983) (holding that "[t]he similarity to be assessed must concern the expression of ideas, not the ideas themselves"). As to the copyrightable material in Appellant's books, the court concluded, on the basis of a comparison of "the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting of the [two sets of books]," that "no reasonable trier of fact could find the works substantially similar." *Williams*, 84 F.3d at 587-88 (internal quotation marks omitted). On that basis, the court granted summary judgment in favor of Appellees. Having considered the matter *de novo*, we now affirm the decision below for substantially the reasons given by the district court.[3]

We have considered all of Appellant's arguments and find them to be without merit. The judgment of the district court is hereby AFFIRMED.

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[3] The district court also decided that Appellant's unjust enrichment claims were preempted by federal copyright law, and therefore dismissed those state law claims. Appellant did not appeal that decision to us. As a result, the question of whether all state law claims of unjust enrichment are preempted by federal copyright law is not before us. *See Perez v. Hoblock*, 368 F.3d 166, 171 (2d Cir. 2004) (issues not raised on appeal are deemed abandoned); *see generally* Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 Harv. L. Rev. 703 (2006) (discussing the scope of federal preemption of state law claims under the 1976 Copyright Act).

For the Court,

ROSEANN B. MACKECHNIE,

Clerk of the Court

by: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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04 Civ. 7417 (GBD)

DAN BROWN and RANDOM HOUSE, INC.,
Plaintiffs,

—against—

LEWIS PERDUE,
Defendant.

LEWIS PERDUE,
Counterclaimant,

—against—

DAN BROWN and RANDOM HOUSE, INC., COLUMBIA PICTURES INDUSTRIES, INC., SONY PICTURES ENTERTAINMENT INC., SONY PICTURES RELEASING CORPORATION, IMAGINE FILMS ENTERTAINMENT, LLC,
Counterclaim-Defendants.

MEMORANDUM OPINION AND ORDER

GEORGE B. DANIELS, District Judge;

Plaintiffs Dan Brown and Random House, Inc. bring suit seeking declaratory judgment that the book, *The Da Vinci Code*, does not infringe the copyrights defendant

Lewis Perdue owns in his books, *Daughter of God* and *The Da Vinci Legacy.* Defendant asserted counterclaims alleging copyright infringement against plaintiffs and other counterclaim defendants.

Plaintiffs submitted a motion for judgment on the pleadings, or in the alternative, for summary judgment on their declaratory judgment claim. Defendant also moved for summary judgment on his counterclaims. The Court finds that there is no substantial similarity between Brown's book *The Da Vinci Code* and Lewis Perdue's books *Daughter of God* and *The Da Vinci Legacy.* Accordingly, defendant's motion for summary judgment is denied and plaintiffs' motion for summary judgment on their declaratory judgment claim is granted.

BACKGROUND

This is an action for copyright infringement under the Copyright Act of 1976, *as amended,* 17 U.S.C. §§ 101 *et seq.* (1994). Lewis Perdue claims that Dan Brown's novel, *The Da Vinci Code,* infringes upon copyrights he owns in *Daughter of God* and *The Da Vinci Legacy.*[1] Brown, who initiated this lawsuit, seeks a declaratory judgment that his work does not infringe upon Perdue's. Perdue counterclaimed, and included as counterclaim-defendants various parties associated with production of the anticipated motion picture version of Brown's *The Da Vinci Code.* Along with his copyright infringement claim, Perdue alleges unjust enrichment, and seeks an accounting of all income deriving from *The Da Vinci Code,* as well as a permanent injunction barring the dis-

[1] *The Da Vinci Code* was published by Doubleday, a division of defendant Random House, in March 2003. *The Da Vinci Legacy* was published in 1983 and *Daughter of God* was published in 2000.

tribution of the book and the motion picture adaptation. He demands damages totaling $150 million.

The threshold issue for deciding whether *The Da Vinci Code* infringes on copyrights in *Daughter of God* and *The Da Vinci Legacy* involves a determination of whether the works are "substantially similar." This determination requires a "detailed examination of the works themselves." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 49 (2d Cir.), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2278, 90 L.Ed.2d 721 (1986).

A. *The Da Vinci Code*

The Da Vinci Code[2] begins with the murder of Jacques Sauniere, the curator of the Louvre Museum, by an albino monk seeking the Holy Grail. The monk is a

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[2] The synopsis of *The Da Vinci Code* from its book jacket is as follows:

While in Paris on business, Harvard symbologist Robert Langdon receives an urgent late-night phone call: the elderly curator of the Louvre has been murdered inside the museum. Near the body, police have found a baffling cipher. While working to solve the enigmatic riddle, Langdon is stunned to discover it leads to a trail of clues hidden in the works of Da Vinci—clues visible for all to see—yet ingeniously disguised by the painter.

Langdon joins forces with a gifted French cryptologist, Sophie Neveu, and learns the late curator was involved in the Priory of Sion—an actual secret society whose members included Sir Isaac Newton, Botticelli, Victor Hugo, and Da Vinci, among others.

In a breathless race through Paris, London, and beyond, Langdon and Neveu match wits with a faceless powerbroker who seems to anticipate their every move. Unless Langdon and Neveu can decipher the labyrinthine puzzle in time, the Priory's ancient secret—and an explosive historical truth—will be lost forever.

The Da Vinci Code heralds the arrival of a new breed of lightning-paced, intelligent thriller utterly unpredictable right up to its stunning conclusion.

member of Opus Dei, a devout Catholic sect headed by Bishop Aringarosa, but is acting at the direction of a mysterious and unknown figure known simply as the "Teacher." Before dying, Sauniere leaves behind a series of clues meant for his estranged granddaughter, including disrobing and placing himself, before his death, in the position of Da Vinci's Vitruvian Man and writing a note that read "P.S. Find Robert Langdon." Langdon, a Harvard professor of religious symbology, is summoned to the Louvre by Bezu Fache, captain of the French judicial police, under the guise of helping to solve the crime. Fache, however, suspects that Langdon is involved with the murder. Also present at the crime scene is Sophie Neveu, a police cryptologist and granddaughter of the victim. Neveu recognizes that the inscription "P.S. Find Robert Langdon," is a message to her (P.S. stood for Princess Sophie). She warns Langdon that he is in danger and that he is suspected by the police of being the killer.

Langdon and Neveu fake an escape from the Louvre, buying them enough time to further dissect and unravel the clues and riddles Sauniere left behind. Using the Fibonacci numerical sequence, the couple determine that a poem left by Sauniere was an anagram of "Leonardo da Vinci! The Mona Lisa!" Neveu and Langdon follow Sauniere's clues to a key with a symbol of the Priory of Sion hidden in the frame of "Madonna of the Rocks," a painting by Leonardo da Vinci who himself served as a Grand Master of the Priory of Sion. Neveu and Langdon are led to the Paris branch of the Depository Bank of Zurich where they are presented with yet more riddles. Solving these riddles allows Neveu and Langdon to determine the account number for Sauniere's deposit box, where they discover a carved wooden box with a cryptex - a stone cylinder invented by Da Vinci to store

objects safely, which can only be opened with a proper password.

The reader learns through Langdon, who serves as an intellectual catalyst and religious historian of the novel, that Sauniere was the Grand Master of a secret society named the Priory of Sion, an organization founded centuries ago and charged with keeping the secret of the Holy Grail. The secret of the Holy Grail is the secret of the divine feminine; that Mary Magdalene was married to Jesus and that they had offspring. Through the years, the Priory of Sion protected this information and guarded the fact that Jesus and Mary Magdalene's bloodline still survives through their descendants.

Although the police converge on the bank, Langdon and Neveu escape with the help of the bank president, who was an old friend of Sauniere. They seek refuge at the home of Sir Leigh Teabing, the wealthy Royal Historian and authority on the Holy Grail. Teabing, portly and ruby faced, suffers from polio and walks with the help of aluminum braces and crutches. Teabing provides a tutorial on the legend of the Grail, shares religious history, and offers evidence that Jesus and Mary Magdalene were married and had a child. He also shares with them clues in Da Vinci's artwork of Mary Magdalene's role in early Christianity.

Teabing's home, however, serves only as a temporary refuge, as both the albino monk and the French police track Langdon and Neveu to Teabing's estate. The monk attacks, demanding the cryptex, but with Teabing's help, the monk is subdued and Teabing, his servant Remy, Neveu and Langdon flee from his estate to the airport, where they board Teabing's private jet and head for London. During the flight, Langdon, Neveu and Teabing work together to determine the password that would

unlock the cryptex. They believe that locked inside the cryptex is the location of the Holy Grail.

In London, Langdon, Neveu and Teabing search for clues to help them determine the password. The albino monk, through the help of Teabing's traitorous servant Remy, gets free, steals the cryptex from Langdon and Neveu and kidnaps Teabing. It is soon learned that Teabing is the "Teacher" and that he deceived Opus Dei into murdering Sauniere and the other Priory masters because he is obsessed with finding and releasing to the public the secret of the Holy Grail. Instead of killing Langdon and Neveu, Teabing implores Langdon to assist him in solving the password to open the cryptex. Langdon, having already determined the password and removed the contents of the cryptex, throws the cryptex in the air, presumably to destroy it. Teabing leaps to save it and falls to the ground as Fache and the police enter the room. Fache arrests Teabing, and Langdon reveals that he knew the password and saved the contents of the cryptex.

The cryptex, in fact, did not contain a map, but rather another riddle that leads Langdon and Neveu to Rosslyn Chapel in Scotland, where Neveu is reunited with her grandmother and brother, whom she thought had died long ago in a car crash. She learns that she is a descendant of Jesus and Mary Magdalene. Neveu's grandmother, during a conversation with Langdon, reveals that the possibility of the existence of the documents and proof is far more important than their actual existence. Neveu invites Langdon to stay. Although he refuses, they make plans to meet again in the near future and the two share an intimate kiss. In a final epilogue, Langdon realizes that the documents and other objects concerning Mary Magdalene are safely hidden underground in an inverted pyramid at the Louvre.

B. *Daughter of God*

At the opening of *Daughter of God*,[3] two Americans, Zoe Ridgeway, an art assessor and broker, and her husband Seth Ridgeway, an ex-police officer turned professor of philosophy and comparative religion, are invited to Zurich by Willi Max, an elderly former Nazi. Faced with imminent death and suffocating guilt, Max wishes to return his vast collection of art, which he stole from Jews during World War II, to their rightful owners. He asks Zoe to assist him in this task.

After their meeting, Max sends to Zoe's hotel a document purportedly to be one of the many lost writings of Emperor Constantine's biographer, Eusebius. The document tells the story of a second Messiah named Sophia who lived in a small remote village during the fourth century A.D. Unbeknownst to Zoe, Max has also sent to her hotel a small painting by a German artist named Frederick Stahl which the reader later learns, is the key to finding evidence to prove her existence. Sophia was an iilegitimate child born into a family of merchants and was raised in isolation until she was a teenager, when she began healing people with her touch. When the reports of her existence and the miracles she performed reached Rome, the Church, fearful of her growing fol-

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[3] The synopsis of *Daughter of God*, as revealed on its back cover, reads:

A FEMALE MESSIAH?

When Zoe Ridgeway, a prominent art broker, visits Switzerland with her husband Seth, she expects to purchase the rich estate of a secretive art collector. But before Zoe can complete the transaction, she and Seth are drawn into a thousand-year-old web of conspiracy, murder, and intrigue that begins and ends with the mystery of a female Messiah, a young girl whose existence, if proven, would explode the very foundation of Western culture.

lowing, brought Sophia and all the members of her village to Byzantium and interviewed them. After the interviews, the Romans killed them all, including the scribe responsible for recording the interviews. The Church wrapped all the victims in shrouds and buried them in a mass tomb in a cave. A week later, when the Romans went to inspect the tomb, one of the shrouds was empty, but contained the image of a fifteen year old girl, Sophia. Centuries later, Hitler gained possession of the sacred shroud, the Passion of Sophia (the story of her life), and other documents that explained her divinity. Hitler used these materials to bribe the Vatican into silence regarding Nazi atrocities. Hitler then hid all the materials in Austrian salt mines.

The story returns to the present day, where a few powerful groups are found vying for possession of the Sophia materials. The reader learns that KGB officials and the Russian mafia, believing that Willi Max has possession of materials that can lead to the Sophia materials, steal Max's art, kill Max, burn down his house, and kidnap Zoe. The Russians believe that the Sophia materials can help them gain more power and wish to use the materials to blackmail the Russian Orthodox Church. Another group, led by Cardinal Neils Braun, a former archbishop of Vienna and the head of a secretive, powerful Vatican intelligence force called the Congregation for the Doctrine of the Faith ("CDF"), also seeks possession of the Shroud. He intends to use the materials to become the next pope. Cardinal Braun tells an unnamed American about the second Messiah, and asks for the American's assistance in securing the shroud and related documents.

The story then flashes back to Seth Ridgeway, who, unable to find his wife, retreats to California despondent over his wife's disappearance. Seth is seen barely work-

ing, drinking, and spending a lot of time on his boat. He is visited by an unknown woman who reveals that the Stahl painting Max had sent to their Zurich hotel before Zoe's kidnaping may help to explain his wife's disappearance and lead him to her location. Suddenly, the boat is attacked and destroyed by unidentified gunmen. Seth escapes and finds help from George Stratten, an officer of the United States National Security Agency. Seth realizes that the painting may be in his unopened mail at UCLA. He slips away from the NSA agents assigned to watch him, retrieves the painting and leaves for Europe in search of his wife.

Meanwhile, in Europe, Zoe is held captive by the Russians in a warehouse. Over a period of a few months, she is interrogated about the painting and forced to help the Russians value their stolen art. Also held captive is a fellow art connoisseur who teaches her about the history of the "Great Goddess," and the presence of divine feminine elements in the world's religions and art. It is through their conversations that the history of the divine feminine is shared. Zoe manages to escape from the Russians and is met by the NSA's Stratton who brings her to a Zurich hotel. Seth, meanwhile, arrives in Europe and while traveling through Amsterdam and Zurich, engages in multiple gunfights with unknown assailants, at least some of them Russian. He manages to arrive at the same hotel where Zoe is staying, and they are reunited.

Together, Zoe and Seth bring the Stahl painting to a Zurich bank where bank officials use turpentine to remove the paint, revealing a gold ingot with Herman Goering's account number and safe deposit key. In Goering's safe deposit box are documents leading to the Sophia materials and instructions on how to dismantle the many traps in the salt mine where the Sophia materials are located. After another gun battle, Seth, Zoe and

Stratton go to the Austrian town of Alt Aussee, where they join forces with Father Hans Morgan, a priest active in the Nazi resistance who now serves as a Church reformer determined to reveal the truth concerning Sophia.

Zoe, Seth, Stratton, Morgan and others crawl through the mineshafts to the heavily fortified salt mine and find the shroud and the Passion of the Sophia in a jeweled box deep within the mine. Stratton, revealed as the unknown American who had promised to help Cardinal Braun recover the shroud, steals and escapes with the jeweled box. He brings it to Cardinal Braun, his true master, who intends to use it to blackmail the current Pope into stepping down and appointing him the successor. Just as Braun is preparing to head to Rome, Seth, Zoe and Morgen arrive at Braun's chalet and attack him. Father Morgan reveals to Braun that the Cardinal is his illegitimate son. Braun, caring only about the Shroud, dies after leaping into a fire to try and save it. In a role reversal, Zoe tells Seth that God has been good to them and that Seth should renew his lapsed faith. Prior to their ordeal, it was Seth who attempted to instill faith in Zoe. They learn that as a result of the fire at Braun's retreat, the entire structure burned except for portion of the floor in the shape of a woman where Sophia's shroud had last been.[4]

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[4] Although Perdue also asserts infringement of his earlier novel, *The Da Vinci Legacy*, he offers no arguments in his moving papers in support of his claims. He argues that his "copyright infringement claims in this action are based primarily on *Daughter of God*" and that "Legacy is mentioned because Brown also plagiarized many elements of Legacy in writing *Da Vinci Code*." Perdue's Memorandum of Law at 1. Indeed, despite his later pronouncement during oral argument that he did not seek to abandon this claim, after reading *The Da Vinci Legacy* and reviewing the parties' arguments, it is clear that any infringement claim based on *The Da Vinci Legacy* also

COPYRIGHT INFRINGEMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S. Ct. 1689, 1694, 123 L. Ed. 2d 317 (1993). The burden of demonstrating that no factual dispute exists is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has met this burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56 (e). In deciding a motion for summary judgment, a court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Summary judgment should be granted only when no reasonable trier of fact could find in favor of the nonmoving party. *Gallo v. Prudential Residential Services, Ltd.*, 22 F.3d 1219, 1224 (2d. Cir. 1994).

In order to succeed on a claim of copyright infringement, "two elements must be proven: (1) ownership of a

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fails to survive Brown's motion for summary judgment. *The Da Vinci Legacy* concerns the quest for missing pages from Leonardo da Vinci's notebooks that contain information necessary to build a charged particle beam weapon. The hero's efforts to locate the missing pages pit him against the corrupt Bremen Legation and the evil Elect Brothers, who seek to construct the weapon. A thorough review of *The Da Vinci Legacy*'s plot, themes, characters and other elements supports a finding of noninfringement. Accordingly, to the extent that defendant Perdue continues to assert a claim of infringement based on *The Da Vinci Legacy*, that claim is also dismissed.

valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). In the absence of direct evidence, copying is proven by showing that (1) defendant had access to the copyrighted work, and (2) there is a substantial similarity of expression in the respective works. *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 137 (2d Cir.1998).[5] Perdue's claims, therefore, turns upon a finding of substantial similarity between the two books. The test for "substantial similarity" is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Warner Bros. Inc. v. American Broadcasting Companies*, 654 F.2d 204, 208 (2d Cir.1981) (quoting *Ideal Toy v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir.1966)).[6] If the similarity concerns only noncopyrightable elements of a work, or no reasonable trier of fact could find the works substantially similar, summary judgment is appropriate. *Walker v. Time Life Films*, 784 F.2d 44, 48 (2d Cir. 1986).

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[5] For purposes of their summary judgment motion, plaintiff-counterclaim defendants have conceded that they had access to Perdue's books.

[6] In support of his claims of substantial similarity, Perdue also submits declarations from John Gabriel Olsson, a specialist in forensic linguistics and Gary Goshgarian, a professor of English at Northeastern University. However, because substantial similarity is judged by the spontaneous response of the ordinary lay observer, expert analysis of the similarities between the two works is not determinative. *See Denker v. Uhry*, 820 F.Supp. 722, 729 (S.D.N.Y. Dec. 8, 1992) (finding expert testimony unnecessary to assess substantial similarity if the proffered testimony does not deal with evidence or material that might help gauge the response of the lay reader).

It is "a principle fundamental to copyright law" that "a copyright does not protect an idea, but only the expression of an idea." *Kregos v. Associated Press,* 3 F.3d 656, 662 (2d Cir. 1993), *cert. denied,* 510 U.S. 1112, 114 S.Ct. 1056, 127 L.Ed.2d 376 (1994). "The distinction between an idea and its expression is an elusive one." *Id.* at 587-588. Judge Learned Hand, in *Nichols v. Universal Pictures Corp.,* 45 F.2d 119, 121 (2d Cir. 1930), provides the guiding principle:

> Upon any work, . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the [work] is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise, the [author] could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.

Id. Furthermore, "the line [lies] somewhere between the author's idea and the precise form in which he wrote it down . . . protection covers the 'pattern' of the work . . . the sequence of events, and the development of the interplay of characters." *Hogan v. DC Comics,* 48 F.Supp.2d 298 (S.D.N.Y. Jan 26, 1999) (citing Z. Chafee, *Reflections on the Law of Copyright,* 45 Colum.L.Rev. 503, 515 (1945)).

Similarly, *scenes a faire,* sequences of events that necessarily result from the choice of a setting or situation, do not enjoy copyright protection. *Williams v. Crichton,* 84 F.3d 581, 587 (2d Cir. 1996) (quoting *Walker,* 784 F.2d at 50); see also *Hoehling v. Universal City Studios, inc.,* 618 F.2d 972, 979 (2d Cir. 1980) ('incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given

topic" are *scenes a faire).* Furthermore, "thematic concepts . . . which necessarily must follow from certain plot situations" are not entitled to copyright protection. *Reyher v. Children's Television Workshop,* 533 F.2d 87, 91 (2d Cir. 1976).

When a work contains both protectible and unprotectible elements, the Court can only inquire whether "the protectible elements, standing alone, are substantially similar." *Williams v. Crichton,* 84 F.3d at 588 (quoting *Knitwaves, Inc. v. Lollytogs Ltd.,* 71 F.3d 996, 1002 (2d Cir. 1995). Any dissimilarity between the works will not automatically relieve the infringer of liability as "no copier may defend an act of plagiarism by pointing out how much of the copy he has not pirated." *Rogers v. Koons,* 960 F.2d 301, 308 (2d Cir.), *cert. denied,* 506 U.S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992). The alleged infringer will be found innocent of infringement when the similarities between the protected elements of the copyrighted works and the allegedly infringing work are of small import quantitatively or qualitatively. *Id.*

A. *Perdue's Specific Claims of Similarity*

The *gravamen* of Perdue's complaint is that Brown copied the basic premise underlying *Daughter of God:*

> notions of a divine feminine, the unity of male and female in pagan worship, the importance of Sophia, the "Great Goddess" of the Gnostic Gospels, the fact that history is relative and is controlled by victors, not losers, the importance of the Roman Emperor Constantine in requiring a transition from a female to a male dominated religion, as well as to create a unified religion having a common dogma, the quest not only for physical objects, but for spiritual fulfillment.

Perdue's Local Rule 56.1 Statement of Undisputed Material Facts, ¶ 153; Perdue's Memorandum of Law at 5. He further argues that the following elements are common to both books: the role of the female; the Church's recasting of the great goddess as evil; the role of Emperor Constantine; Christianity's adoption of pagan practices; the existence of the divine feminine; the heroines' epiphany regarding the Great Goddess; the physical evidence of the divine feminine; the fact that there are keepers of the physical evidence; the Catholic Church's awareness of the existence of the Holy Grail and the Sophia Passion; the existence of two organizations who seek to obtain the physical evidence; similarities between Opus Dei and the Congregation for the Doctrine of Faith; the protagonists' unwillingness to participate in the struggle between the competitors to obtain the physical evidence; the female's equal claim to divinity as males and that through their union, they become much more than the sum of their parts; the enemy who acts as a wolf in sheep's clothing; the protagonists' realization that possessing the physical evidence is not as important as the understanding of what the physical evidence represents; the conclusion that the hero and heroine are themselves pursued by the quest for the physical evidence; similarities between the treatment of Mary Magdalene in *The Da Vinci Code* and Sophia in *Daughter of God;* the use of historical references, particularly Constantine, in both novels; the fact that both novels incorporate the use of a gold key; the novels' similar discussion of women, the Goddess, Creation and How God became a male; similar discussions of Mother Earth; the theme that people create their own gods; and lastly, a similar discussion in both novels regarding communion.

All of these similarities, however, are unprotectible ideas, historical facts and general themes that do not represent any original elements of Perdue's work. For example, although both novels discuss Emperor Constantine and the Council of Nicea, it is without question that references to historical figures and events constitute unprotectible elements under the copyright laws, as "[n]o claim of copyright protection can arise from the fact that plaintiff has written about such historical and factual items." *Alexander v. Haley.* 460 F.Supp. 40, 45 (S.D.N.Y. Sept. 21 1978) (citing *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966). Also, copyright protection does not extend to thematic concepts or scenes which must necessarily follow from similar plot situations. See *Reyher,* 533 F.2d at 91. Both *Daughter of God* and *The Da Vinci Code* involve the unprotectible *idea* of a mystery thriller set against a religious backdrop. As a mystery thriller, common themes of "the wolf in sheep's clothing," or the theme that "history is relative and is controlled by victors, not losers," or the theme that "through [the union of hero and heroine], they become much more than the sum of their parts," are unprotectible stock themes common to the genre. *See Williams v. Crichton,* 860 F.Supp. 158, 166 (S.D.N.Y. Aug 17, 1994), *aff'd Williams v. Crichton,* 84 F.3d 581 (2d Cir. 1996) (holding that themes commonly repeated in certain genre are not protectible by copyright as no one can own the basic idea for a story).

Indeed, it is not original in this genre to have a storyline whereby "two organizations or people who would stop at nothing, including murder, to obtain physical evidence," that there are keepers of this physical evidence, or that "the hero and heroine became unwilling participants in the struggle between the competitors to obtain the physical evidence." Furthermore, the fact that the

hero and heroine realize that possessing the physical evidence is not as important as the understanding of what the physical evidence represents, or that the reader is led to conclude that the hero and heroine are themselves pursued by the quest for the physical evidence, offers nothing new to this type of story. Moreover, because *Daughter of God* and *The Da Vinci Code* share a religious backdrop, Perdue's claims that the novels share a similar theme that "people create their own gods," and that both novels have "discussions of Mother Earth" and "discussions about communion" are not afforded copyright protection. Perdue has not alleged that his unique *expression* of these ideas and themes were copied. Ideas and general literary themes themselves are unprotectible under the copyright law.

Perdue also alleges various discrete similarities between the two plots. However, although both novels discuss the Catholic Church, such discussion is expected from a thriller with religious themes and is an unprotectible *scene a faire*. *See Williams v. Crichton*, 84 F.3d at 587 (similar scenic elements are unprotectible *scenes a faire* that follow naturally from the work's theme rather than the author's creativity). Similarly, Perdue's claims that both novels discuss Swiss bank accounts and gold keys or that the novels begin with a murder are unprotectible scenes a faire that precludes a finding of substantial similarity.[7] Perdue's claim that there are similarities between Opus Dei and the Congregation for the Doctrine of Faith, two real and existing organizations is also unprotectible. *Walker*, 784 F.2d at 49 (finding that copyright protection does not extend to facts).

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[7] Indeed, although there is clearly a gold key in *The Da Vinci Code*, *Daughter of God* references a "very small *ingot* fixed into a recess of the wood substrate on which the paint had been applied." *Daughter of God* at 312 (emphasis added).

A significant part of Perdue's argument focuses on the ideas and broad themes concerning the divine feminine, the important role of the female in early religion, the importance of Sophia, the "Great Goddess" of the Gnostic Gospels, and how she was re-cast by the Church as evil, the unity of male and fema[illegible]n pagan worship and Christianity's adoption of pagan practices as well as the importance of Emperor Constantine in requiring a transition from a female to a male dominated religion. Perdue argues that he "first incorporated these elements in" an earlier novel titled *Linz Testament* which he "extensively re-worked" into *Daughter of God.* Perdue's Memo at 5. A central theme of *The Da Vinci Code* is the suppression of the divine feminine in the Christian tradition. He claims that "the material plagiarized in [*The Da Vinci Code*] consists of an extensive and detailed synthesis of history and multiple schools of theology that Perdue created for *Daughter [of God]* and based on equally unique work expressed in *Linz [Testament]* and [*Da Vinci*] *Legacy.*" Perdue's Facts ¶ 212.

Perdue argues that Brown stole his "synthesis" of differing religious beliefs emanating from the Gnostic Gospels. He has made no factual allegations, however, to support a finding that Brown copied his *expression* of these ideas. Moreover, these ideas and themes find their origin in historical facts, events and figures, as well as pre-existing works. *See Hoehling,* 618 F.2d at 979 (finding that, despite plaintiff's claim that specific facts, ascertained through his personal research, were copied, such facts are unprotectible, as defendants "had the right to avail [themselves] of the facts contained in [plaintiff's] book" and "to use such information, whether correct or incorrect, in their own work") (citing *Greenbie v. Noble,* 151 F.Supp. 45, 67 (S.D.N.Y. 1957); *see also Alexander,* 460 F.Supp. at 45 ("where common sources

exist for the alleged similarities, or the material that is similar is otherwise not original with the plaintiff, there is no infringement"). In his Author's note in *Daughter of God,* Perdue himself states that "[t]his is a work of fiction based on fact. . . . The sections of this book dealing with the Nicean Conference and the events and religious controversies leading up to it are true and far better documented than any of the scriptures in the Hebrew or Christian Bible or the Muslim Koran." *Daughter of God* at 420. Perdue concedes that "[m]uch of his research [about the sacred feminine and the Great Goddess] involved the Gnostic Gospels, discovered at Nag Hammadi, Egypt in 1945, but not translated until the 1970's, and works commenting upon those Gospels." Perdue's 56.1 Statement, ¶ 156. Furthermore, there is no substantial similarity in the expression of the divine feminine in each book. In *The Da Vinci Code,* the divine feminine is expressed as Mary Magdalene, a true biblical figure, while in *Daughter of God,* the divine feminine figure is Sophia, a fictional second Messiah created by Perdue. As copyright protection "does not extend to facts or to true events, even if they are discovered through original research," Perdue's claims regarding these ideas and themes are unprotectible. *Walker,* 784 F.2d at 49.

B. *A Comparison of* The Da Vinci Code *and* Daughter of God

The critical examination which must be conducted, in order to determine whether *The Da Vinci Code* is substantially similar to *Daughter of God* to support copyright infringement, is a review of relevant similarities between the two works "in such aspects as the total concept and feel, theme, characters, plot, sequence, pace and setting." *Williams v. Crichton,* 84 F.3d at 588.

1. Thematic Expression

"In its ordinary meaning, a theme is understood to be the underlying thought which impresses the reader of a literary production, or the text of a discourse. Using the word 'theme' in such a sense will draw within the circle of its meaning age-old plots, the property of everyone, and not possible of legal appropriation by an individual." *Roe-Lawton v. Hal E. Roach Studios,* 18 F.2d 126, 127 (D.C.Cal. 1927). Indeed, thematic concepts which follow from similar plot situations are not afforded protection under the copyright laws. *See Smith v. Weinstein,* 578 F.Supp. 1297, 1302 (S.D.N.Y. Jan. 24, 1994). General themes expressed in *Daughter of God* are afforded no copyright protection. "[T]he essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization." *Reyher,* 533 F.2d at 91.

The Da Vinci Code's expression of the divine feminine and its related themes differ markedly from their expression in *Daughter of God.* In *The Da Vinci Code,* Mary Magdalene represents the Divine Feminine that was suppressed by the Church. Through Langdon's character, Brown shares with the reader the history and importance of women and the sacred feminine in early religion. Through Langdon's and Teabing's monologues, Neveu and the reader are introduced to the belief that Mary Magdalene was the wife of Christ and that they produced offspring. This secret, which the reader is shocked to learn represents the truth of the Holy Grail, was kept protected by a group called the Priory of Sion, whose military arm, the Knights Templar, guarded the secret with their lives. The reader eventually learns that Neveu is a descendant of Christ and Mary Magdalene.

In *Daughter of God,* a fictional second messiah named Sophia represents the Divine Feminine suppressed by the Church. Sophia, who existed around 325 A.D. in a remote mountain village near the Anatolian city of Smyrna (in present-day Turkey), was executed by the Romans after news of her miracles hit the Vatican. An early discussion between Zoe and Seth introduces the reader to Sophia and to Constantine's influence on the early church. Sophia's history is further shared through one of the villains, Cardinal Braun, who discusses it with NSA Agent Stratton, while the historical details of the Church's suppression of the divine feminine is shared through a conversation between Zoe and Thalia, a fellow captive. Evidence of Sophia's existence, and of the role the Church played in executing her, came into the hands of the Nazis during World War II. The search for this evidence is the foundation of *Daughter of God.* Rival groups, including a conservative arm of the Church, the Russian mafia and former KGB, and the heroes all strive to obtain this evidence for their own underlying purpose. Brown's expression of his religious themes in *The Da Vinci Code* differ markedly from Perdue's expression of his themes in *Daughter of God.*

2. Total Concept and Feel

The total concept and feel of a literary work is comprised of the way an author "selected, coordinated and arranged the elements of his or her work," *Feist Publications, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 358, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991), taking into consideration similarities in "mood, detail or characterization." *Reyher,* 533 F.2d at 91-92. Where there is a marked difference in total concept and feel, summary judgment is appropriate. *Id.* at 92; *see also Denker v. Uhry,* 820 F.Supp. 722, 731 (S.D.N.Y. 1992), *aff'd,* 996

F.2d 301 (2d Cir. 1993). Although both novels at issue are mystery thrillers, *Daughter of God* is more action-packed, with several gunfights and violent deaths. *Daughter of God* also includes a perilous journey through an Austrian salt mine and includes sex scenes not present in *The Da Vinci Code*. *The Da Vinci Code,* on the other hand, is an intellectual, complex treasure hunt, focusing more on the codes, number sequences, cryptexes and hidden messages left behind as clues than on any physical adventure. For example, Neveu, Langdon, Teabing and his servant's escape from the police in a Range Rover through the dark woods proceeds at such a slow pace that it cannot reasonably be called a chase scene.

Furthermore, although *Daughter of God* references art and discusses religious history, *The Da Vinci Code's* treatment of these subjects involves more detail. Brown weaves his mystery through detailed discussions of Da Vinci's art, art and religious history and mathematical formulas. An early scene, involving Neveu and Langdon's attempt to decipher the clues Sauniere left at his murder site, references Leonardo da Vinci's Vitruvian Man, the Fibonacci sequence, the Divine Proportion, *Phi,* and the Mona Lisa. *Daughter of God*'s discussion of art, on the other hand, occurs principally through Thalia and Zoe's review of the art stolen by the Russians as they work to catalogue all the stolen pieces. No reasonable jury could conclude that the total concept and feel of *The Da Vinci Code* is substantially similar to that of *Daughter of God.*

3. Plot

A plot is "the story or narrative. It is the designed sequence of connected incidents. It is the thing which moves the [work] from cause to effect. It means, as its

etymology implies, a weaving together." *Golding v. RKO Radio Pictures, Inc.*, 193 P.2d 153, 163 (Cal.App. 2 Distr. 1948), *aff'd* 35 Cal.2d 690, 221 P.2d 95 (1950). Although "in its broader outline a plot is never copyrightable," *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), alleged similarities in plot and structure at "the next level of specificity" may be protectible. *Id.* at 49. Courts are to determine whether the fundamental essence and structure of the novels are substantially similar. *See Arden v. Columbia Pictures Industries, Inc.*, 908 F.Supp. 1248, 1260 (S.D.N.Y. Dec. 7, 1995) (finding no substantial similarities between the fundamental structure and essence of each plot).

At the most general level of abstraction, both novels tell a story based on religious and historical people, places and events. The factual details that underpin each book, however, are quite different. The scenes and events show no substantial similarity of expression in the respective works. For example, while the *The Da Vinci Code* weaves a story with historical references to Michelangelo and Leonardo da Vinci, Opus Dei and the Priory of Sion; *Daughter of God* discusses Adolph Hitler and the Nazis, Hermann Goering, Frederick Stahl, and the Congregation for the Doctrine of Faith. Indeed, *The Da Vinci Code*'s incorporation of mathematical subjects like Phi, the Divine Proportion and the Fibonacci Sequence into its story has no parallel in *Daughter of God.*

Daughter of God involves a husband's search for his missing wife. His search uncovers a religious secret involving a fictional second Messiah, the knowledge of which is being sought by a radical arm of the Catholic Church and by the Russian mafia and former KGB for their own evil purposes. The husband's search for his wife leads him to different parts of the globe. Further-

more, in *Daughter of God,* the search is for actual physical objects, including documents evidencing Sophia's existence and her burial shroud. In *The Da Vinci Code,* the plot centers on determining what the secret is. Langdon and Neveu's mission, as the protagonists, is to decipher, through clues left behind by her murdered grandfather as well as clues hidden in historical places and works of art, the ancient secret. Furthermore, Langdon and Neveu never actually find any physical objects. Rather, the secret they learn is that Neveu is a descendant of Christ, that her grandmother and brother are actually alive, and that Mary Magdalene's bones may be hidden beneath the inverted pyramid at the Louvre. The fundamental essence and structure of the plots are not substantially similar and offer no support to Perdue's infringement claim. *The Da Vinci Code* is simply a different story than that told by *Daughter of God.*

4. Characters

In determining whether characters are similar, a court looks at the "totality of [the characters'] attributes and traits as well as the extent to which the defendants' characters capture the total concept and feel of figures in [plaintiff's work]." *Walker,* 784 F.2d at 50 (internal quotations and citations omitted). What the character thinks, feels, says and does as well as the descriptions conveyed by the author through other characters' comments fill out a viewer's understanding of the character. *Warner Bros. v. American Broadcasting Cos.,* 720 F.2d 231, 241 (2d Cir. 1983). "At the same time, the visual perception of the character tends to create a dominant impression against which the similarity of a defendant's character may be readily compared, and significant differences readily noted." *Id.*

There is no substantial similarity between any of the characters in *The Da Vinci Code* and *Daughter of God.* The heroes and heroines are different in each book. In *The Da Vinci Code,* the hero is Robert Langdon, a bookish professor of symbology from Harvard. Langdon's physical attributes are not emphasized, rather, he serves as the intellectual wheel that keeps the plot moving. It is Langdon who solves most of the major riddles and questions, including the final puzzle at the climax. Interestingly, Langdon is secular, and his interests in religious history are purely academic. In *Daughter of God,* the hero is Seth Ridgeway, a former police officer who has athletic prowess and strong physical attributes. Seth retired from the police department after receiving several gunshot wounds. Although he is a professor of philosophy and religion, the book does not focus on his intellect. Unlike Langdon, Ridgeway experiences a crisis of faith because of his wife's disappearance.

The heroines also share few similarities. Sophie Neveu, the young French symbologist, was raised by her grandfather in a life of privilege. Her intellect, coupled with her knowledge of cryptology, allow her to assist in solving the many riddles and puzzles left by Sauniere. Seth Ridgeway's wife, Zoe, on the other hand, is a more mature, self-employed art appraiser. She is an expert in her field. She has been trained in detecting forgeries and grew up in a blue collar household.

Sir Leigh Teabing serves as the primary villain in *The Da Vinci Code,* but his evil role as the "Teacher," who masterminded Sauniere's execution, is not revealed until the end of the novel. He has two associates, Remy, his assistant, and Silas, the albino monk. Remy's involvement is minor while Silas serves the role as the threatening killer. Indeed, it is through Silas' hands that Sauniere and the other members of the Priory of Sion are

murdered. Teabing's quest for the Holy Grail is motivated by his distaste for the Church.

Daughter of God, on the other hand, has many villains. One set of villains include Russian mobsters and former KGB, who desire the Sophia documents and Shroud for power. Although the Russians dominate the early part of the book, their presence is minimized after Zoe kills the Hulk, her huge Russian captor, and escapes from their detention. Another set of villains include Cardinal Braun and his lackey, NSA Agent Stratton. Braun's desire for the Sophia materials also stems from a desire for more power. In this regard, as well as in physical attributes, he is nothing like *The Da Vinci Code*'s antagonist, Teabing, who is crippled and uses crutches when he walks. Further, although Perdue argues that Teabing and Stratton are both "shapeshifters" (because they first appear friendly and later reveal themselves as the enemy), such a characterization ignores the different roles each serves in their respective novels. Teabing is the ultimate villain in *The Da Vinci Code*. His mysterious alter-ego, the "Teacher," is smart, conniving, diligent and well planned. Stratton, on the other hand, is simply a lackey for Cardinal Braun. Stratton, from physical appearance to mental and intellectual characteristics, shares nothing in common with Teabing. Other main characters such as Bezu Fache, the police captain who chases Langdon and Neveu in *The Da Vinci Code,* Father Aringosa, the head of Opus Dei in *The Da Vinci Code,* and Father Hans Morgan, the reformist priest in *Daughter of God,* have no parallels in the other book.

5. Sequence, Pace and Setting

Although both *Daughter of God* and *The Da Vinci Code,* as mystery thrillers, enjoy fast paced scenes, the time sequence of each book differs considerably.

Daughter of God takes place over many months. Indeed, after the opening sequence introducing Zoe, Seth and Max in Switzerland, Seth is found in his boat *six months later,* still suffering from Zoe's disappearance. After Seth is visited by the strange woman with information concerning Zoe on his boat, the novel proceeds at a quick but steady pace over the course of a few weeks. *The Da Vinci Code,* however, starts quickly and moves quickly. The reader immediately gets a sense that time is of the essence. The period from Sauniere's death at the Louvre to the final confrontation at Westminster Abbey, the majority of the novel, takes place over a matter of days.

The setting of each book is also different. While the *The Da Vinci Code* takes the reader from Paris to London and visits landmarks such as the Louvre Museum and Westminster Abbey, *Daughter of God* begins in Zurich, travels through southern California, Amsterdam and Italy and ends in Austria. The characters, sequence, pace and setting of each book are not substantially similar and do not support an infringement claim.

A comparison of these different novels warrants a rejection of the claim that Brown's *The Da Vinci Code* infringes upon copyrights Perdue owns in his previous works *Daughter of God and The Da Vinci Legacy.*

REMAINING COUNTERCLAIMS

In his Third Counterclaim, Perdue alleges that "[a]s a result of [counterclaim defendants'] illegal and improper exploitation of [his] intellectual property, [counterclaim defendants] have been unjustly enriched at the sole

expense and to the sole detriment of [Perdue]." Perdue's Answer and Counterclaims ¶ 107.[8]

Under the Copyright Act, state law claims are preempted if "(1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106." *Briarpatch Limited, L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). The works in question fall within the types of works protected under 17 U.S.C. §§ 102 and 103. Moreover, Perdue's unjust enrichment claim is based entirely on the validity of his copyright claim. He alleges no facts to support his unjust enrichment claim different from his copyright infringement claim. Accordingly, his unjust enrichment claim must also be dismissed.

Relatedly, Perdue's second counterclaim for an accounting of all income, expenses and profits related to *The Da Vinci Code*, and his fourth counterclaim for a permanent injunction enjoining counterclaim defendants from all activities related to the production of the motion picture version of *The Da Vinci Code*, must also be dismissed. His accounting claim is pled on the grounds that he is unable to ascertain the amount of money owed by plaintiffs without an accounting. As his underlying infringement claim is unsupportable, no money is owed and no accounting is necessary. Under that same prin-

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[8] Although dismissal of Perdue's federal claims allows dismissal of his state common law unjust enrichment claim without prejudice to their commencement in state court, this Court exercises jurisdiction over this pendant claim and dismisses it on its merits. *See United Mine Worker's of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

ciple, Perdue's derivative claim against the motion picture defendants must also be dismissed.

CONCLUSION

A reasonable average lay observer would not conclude that *The Da Vinci Code* is substantially similar to *Daughter of God*. Any slightly similar elements are on the level of generalized or otherwise unprotectible ideas. Defendant Perdue's motion for summary judgment is denied and all of his counterclaims are dismissed. Plaintiffs' motion for summary judgment is granted. Plaintiffs are awarded declaratory judgment declaring that plaintiffs' authorship, publication and exploitation of rights in and to *The Da Vinci Code* do not infringe any copyrights owned by defendant.

Dated: New York, New York
August 4, 2005

SO ORDERED:

/s/ GEORGE B. DANIELS
GEORGE B. DANIELS
United States District Judge

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No. 06-213

FILED

OCT 10 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LEWIS PERDUE,

Petitioner,

—v.—

DAN BROWN and RANDOM HOUSE, INC., IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether summary judgment must be denied when expert affidavits are proffered or whether it is within the sound discretion of the trial court in a copyright case to determine that expert affidavits are not determinative in deciding that there is no "substantial similarity" in protected expression between two works of popular fiction.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, Respondents Random House, Inc., Imagine Entertainment (improperly sued herein as Imagine Films Entertainment, LLC), Sony Pictures Releasing Corporation, Sony Pictures Entertainment Inc. and Columbia Pictures Industries, Inc., state that:

Random House, Inc., a New York corporation, is a wholly owned subsidiary of Bertelsmann Publishing Group, Inc., a privately held corporation, which is in turn a wholly owned subsidiary of Bertelsmann, Inc., a privately held corporation. Bertelsmann, Inc. is a wholly owned subsidiary of Bertelsmann AG., which is privately owned.

Sony Pictures Entertainment Inc. is an indirect wholly-owned subsidiary of Sony Corporation, a publicly-traded Japanese company.

Sony Pictures Releasing Corporation and Columbia Pictures Industries, Inc. are indirect wholly-owned subsidiaries of Sony Pictures Entertainment Inc.

Imagine Entertainment is a privately held company.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves no substantive conflict in the circuits and no issue regarding any disparity in the treatment of expert testimony in copyright cases. To the contrary, across the circuits, consistent with the applicable standards set out in the Fed. R. Evid. 702, it lies well within the discretion of the court to admit or reject expert testimony depending on whether the testimony will assist the trier of fact. Rather than presenting any issue for this Court, this case involves the run-of-the-mill review of two works of popular fiction to see if substantial similarities existed to give rise to a copyright infringement claim. The courts below did not exclude or reject the proffered declarations, but simply held that they created no genuine issue of material fact. A simple reading of the works at issue inextricably led to the conclusion that the novels' respective plots, characters, themes, and total concept and feel were radically different. In short, this case involves no novel issues and most certainly does not conflict with any decisions of this Court. There is no basis for a grant of certiorari and the petition should be denied.

In 2003, Random House published Dan Brown's novel, *The Da Vinci Code* ("*Da Vinci Code*"), an instant critical and commercial success. In the wake of that success, Petitioner Perdue launched a campaign in the press and internet that *Da Vinci Code* copied his books, *Daughter of God* ("*Daughter*")

and *The Da Vinci Legacy* ("*Legacy*").[1] When Perdue threatened to sue for copyright infringement, Brown and Random House sought a declaratory judgment of non-infringement. Perdue counterclaimed against Brown and Random House and also named as defendants the makers of the movie version of *Da Vinci Code* (together "Random House"), seeking $150 million in damages. (Cir. App. 32-95).

Relying on the respective books and other works documenting previously published historical facts and theories discussed in the books, Random House moved for judgment on the pleadings or in the alternative for summary judgment. Solely for purpose of the motion, Random House did not dispute access (the first element of a copyright claim), but argued that no reasonable juror could find that there was substantial similarity of protected expression between the books (the second element of a copyright claim). Indeed, as is commonly done in copyright claims involving popular fiction, Random House argued that the district court was more than capable of filtering out the unprotected elements and engaging in a side-by-side comparison of the remaining protected elements to determine if an ordinary observer could conclude that there was substantial similarity between the works.

In a thorough decision, the district court granted Random House's motion, holding that all of Perdue's alleged similarities were merely "unprotectible ideas, historical facts and general themes that do not represent any original

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[1] Perdue essentially abandoned any claim that *Da Vinci Code* copied from *Legacy*. (*See* Petn. App. 3a. n. 1). Throughout this brief, references to Petn. App. are to the appendix of the Petition for a Writ of Certiorari, which contains the District Court and Second Circuit opinions. References to Cir. App. are to the Joint Appendix filed in the Second Circuit.

elements of Perdue's work" and that the works were not substantially similar in plot, theme, characters, sequence, pace, setting or "total concept and feel." Petn. App. 22a, 33a.

As found by the district court, *Da Vinci Code* is a suspense novel built on complex puzzle clues, several of them connected to Leonardo Da Vinci's art. The novel opens with the murder of the curator of the Louvre, and the rest of the story follows the protagonists, Harvard Professor Robert Langdon and the curator's granddaughter Sophie Neveu, as they decipher the curator's messages. The trail of ingenious clues eventually leads them to the revelation that Jesus and Mary Magdalene were married and had descendants (including Sophie), a secret kept throughout history by the Priory of Sion. In sharp contrast, Perdue's *Daughter* is a "shoot-'em-up" thriller, involving Nazis and Russian mafia, where husband and wife protagonists battle an ultranationalist Russian leader and a megalomaniacal Cardinal seeking to depose the Pope. The secret at issue in *Daughter* involved relics documenting an entirely fictional second Messiah named Sophia, who was born and arose in Anatolia in the Fourth Century.

There was no serious dispute concerning the readily apparent conclusion that the books had radically distinct plots, characters, settings and other necessary elements to find substantial similarity. Rather, Perdue primarily argued that *Da Vinci Code* infringed *Daughter* because both books have an allegedly similar "back story" since they each cite to certain historical events and theories concerning Emperor Constantine and the Nicaean Conference, and both discussed the Gnostic Gospels (early versions of the gospels written by the Gnostics and unearthed in Egypt in 1945) and the Gospels' exploration of the feminine aspects of God, a concept known as the "divine feminine."

In a straightforward analysis, employing well-established copyright principles, the district court determined that the only similarities involved abstract themes and historical facts and theories, and concluded that there cannot be copyright infringement when Perdue "has not alleged that his unique *expression* of these ideas and themes were copied." Petn. 23. Thus, "it is without question that references to historical figures and events constitute unprotectible elements under the copyright laws." Petn App. 22a. Likewise, common stock elements or mere abstract ideas are not protected by copyright law. As the district court held, "Both *Daughter* and *The Da Vinci Code* involve the unprotectible *idea* of a mystery thriller set against a religious backdrop. As a mystery thriller, common themes of 'the wolf in sheep's clothing,' or the theme that 'history is relative and is controlled by the victors, not losers,' or the theme that 'through [the union of hero and heroine], they become much more than the sum of their parts,' are unprotectible stock themes common to the genre." Petn. App. 22a.

After separating out these unprotectible elements, the district court engaged in the routine side-by-side comparison of two popular novels intended for mass readership in order to decide whether there had been *actionable copying*, that is, copying of protectible expression amounting to infringement. Among other factors, the district court readily concluded that, "*The Da Vinci Code* is simply a different story than that told by *Daughter*." Petn. App. 30a. The district court also explained that, although both books drew on religious themes, including the divine feminine, their expression of those themes was entirely different. Considering the characters, the district court found no substantial similarity between any of them, contrasting, for example, Brown's secular, academic, bachelor Professor Langdon with Perdue's Seth Ridgeway, an ex-cop of strong athletic prowess who experiences a central crisis of faith and is

motivated throughout much of the book by the search for his missing wife. Petn. App. 31a. Finally, the district court found that no reasonable jury could find the concept and feel of the respective works to be substantially similar, noting that *Daughter* is "action-packed, with several gunfights and violent deaths" while *Da Vinci Code* is "an intellectual, complex treasure hunt, focusing more on codes, number sequences, cryptexes and hidden messages left behind as clues than on any physical adventure." Petn. App. 28a.

In reaching its decision, the district court briefly addressed (and did not reject or exclude) two so-called expert declarations submitted by Perdue. One expert, Gabriel Olsson, propounded a thirteen-page report that uses "linguistic forensics" to identify "similarities" between Brown's *Da Vinci Code* and Perdue's *Daughter* and *Legacy*. Cir. App. 307-22. Untethered by actual citations to the books and failing to identify whether an alleged similarity exists in *Daughter* or *Legacy*, the report gathers together a grab bag of abstract similarities, such as each hero is in his "late 30's to early 40's" and has "signs of aging," or each heroine is "not slim" and is "not blonde." Cir. App. 313-14, 316. The other expert, Gary Goshgarian, an English professor, submitted a five-page report which purported to identify certain elements in the books that he claimed were not, in fact, stock elements (or "generic"). Cir. App. 294-98. Yet, other than the observation that, in addition to *Da Vinci Code* and *Daughter*, there is only one other novel "of religious intrigue involving a sacred female whose existence could destroy the church," Goshgarian, like Olssen, simply lists "similarities," such as that both works supposedly involve "a gold key hidden in a key painting," or that both novels involve escapes from Zurich banks. Cir. App. 295-97. Neither expert report includes any evidence or analysis to rebut the obvious conclusion that virtually all the identified similarities were simply abstract ideas, historical

facts or stock elements that naturally flowed from the ideas and circumstances of the works.

Random House objected to the expert reports on several grounds.[2] At bottom, however, the reports were simply unnecessary and added nothing to an analysis that the district court was well-equipped to employ. The court was called on to do no more than compare works of popular fiction – not complicated computer codes or technical engineers' reports. The reports did nothing more than identify alleged similarities in the same manner that the court could (and ultimately did) determine for itself. As such, instead of excluding them, as petitioner asserts, the court was well within its discretion to find the declaration to be not "determinative."

Perdue's counsel did not seriously dispute this conclusion. Although he half-heartedly argued that the expert declarations might "help" the court in its substantial similarity analysis, at the argument below, he unequivocally agreed that "the best thing for [the court] to do is to read the books in question." Cir. App. 404. Indeed, in the end he conceded, "I agree that the test calls for you as a lay person to read [the books]. I believe that the materials we have submitted from people like Mr. Olssen and the charts we have created and everything else can help you do that. But the best tool for doing that is your own brain." Cir. App. 419.[3]

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[2] Among other things, the reports were far more prejudicial than they were probative under Fed. R. Evid. 403 because they applied the wrong legal standard on substantial similarity, hopelessly confused the issues and included verifiably false facts (such as that each work included a gold key).

[3] Perdue admits in his petition that the experts add nothing that cannot be gleaned from the books. Indeed, Perdue merely argues that

The district court addressed Perdue's expert evidence as follows:

> In support of his claims of substantial similarity, Perdue also submits declarations from John Gabriel Olsson, a specialist in forensic linguistics and Gary Goshgarian, a professor of English at Northeastern University. However, because substantial similarity is judged by the spontaneous response of the ordinary observer, expert analysis of the similarities between the two works is not determinative. *See Denker v. Uhry*, 820 F. Supp. 722, 729 (S.D.N.Y. Dec. 8, 1992) (finding expert testimony unnecessary to assess substantial similarity if the proffered testimony does not deal with the evidence or material that might help gauge the response of the lay reader).

Petn. App. 18a n. 6. The district court did not find that the law *required* it to ignore the expert declarations, merely that they and "not determinative" of substantial similarity in the case, *i.e.*, that they created no genuine issue of material fact. The district court did not, as petitioner inaccurately claims (Petn. 6), "refuse to consider" the declarations or "reject" them. Rather, it simply held that the two proffered declarations created no material issue of fact precluding the grant of summary judgment on the ground that *Da Vinci Code* simply did not infringe protectible expression of Perdue.

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certain "similarities can be gained from the books themselves, but Olsson's affidavit makes comparison much easier because each book exceeds 400 pages in length." Petn. 11.

Perdue appealed the district court's decision that no reasonable jury could find the two works substantially similar. Among his arguments on appeal, Perdue challenged the district court's refusal to deny summary judgment on the basis of his expert declarations and argued that judges may not rely on their own personal knowledge or common sense in determining what is a fact, historical theory or scenes à faire in copyright cases. 177 Fed. Appx. 121 (2d Cir. 2006); Petn. App. 1a. The Second Circuit, reviewing the evidence *de novo* and expressly considering "all of Appellant's arguments" unanimously affirmed "for substantially the reasons given by the district court." Petn. App. 5a.

Perdue is now petitioning the Court for a Writ of Certiorari to resolve a purported circuit split on the admission of expert testimony in copyright cases. Petitioner grossly misstates the current state of the law in an attempt to carve out a bright-line conflict which does not exist. He also ignores the reality that the district court in fact considered virtually all the similarities addressed in the expert declarations and concluded that they did not create a genuine dispute on the core issue of substantial similarity.

REASONS FOR DENYING THE PETITION

Petitioner's claim to have identified a bright-line circuit split on the issue of admissibility of expert testimony on substantial similarity in claims of copyright infringement does not survive a simple review of the cases. There is no such split. Rather, well articulated and flexible general principles, drawn from Fed. R. Evid. 702, guide courts in reviewing the relevance of expert testimony on a case-by-case basis. Because these discretionary principles will continue to govern expert admissibility in any given case, the rule proposed by Petitioner would not lead to the uniformity Petitioner claims to seek.

Further, the proceedings below did not depart from the accepted course of judicial proceedings. The court of appeals affirmed a text-book application by the district court of the prevailing law in granting summary judgment in copyright cases involving literary works. The court undertook precisely the kind of detailed analysis required by law, and the expert declarations failed to create any issue of fact that would have precluded summary judgment. The decisions do not conflict with any decisions of this Court. Nor do the decisions below raise an important federal question that this Court should settle. In short, the Petition invokes none of the considerations favoring a grant of certiorari listed in Rule 10 of the Rules of the Supreme Court of the United States, and it should be denied.

I. THERE IS NO BRIGHT-LINE CONFLICT AMONG THE CIRCUITS ON THE USE OF EXPERT TESTIMONY TO AID THE COURT IN DETERMINING SUBSTANTIAL SIMILARITY

The bright-line circuit split claimed by Petitioner simply does not exist. Petitioner has attempted to squeeze the circuits into a legal straight-jacket of his own invention. But the case law shows a flexibility and subtlety that resists such simplistic characterizations. This Court's intervention is not required, and it would not result in the uniformity Petitioner claims to seek.

Although courts in various circuits have developed (and continue to develop) procedural mechanisms for evaluating copyright infringement, the underlying principle on the admission of expert testimony is based on Federal Rule of Evidence 702 and is common to all circuits:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact

> in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed R. Evid. 702.[4]

In many if not most copyright infringement cases across the circuits, especially those involving traditional media and a broad lay audience, judges exercising their discretion will tend to discount expert testimony as unhelpful, unnecessary or even misleading. Throughout the circuits, courts routinely grant summary judgment in cases involving novels, plays and movies on the ground that there is no substantial similarity of protected expression, and do so without reliance on experts. In general, expert testimony is deemed useful in particularly complex cases involving highly technical subject matter, such as computers, music or architecture, or in cases involving works with narrowly-targeted audiences. But Rule 702 gives judges flexibility to not rely on such evidence when it would not "assist the trier of fact to understand the evidence or to determine a fact issue." This flexibility provides a good balance between ensuring a thorough and informed evaluation of the merits of a copyright infringement claim, while conserving judicial resources, limiting unnecessary costs in litigation, and avoiding unnecessary, often unhelpful, testimony.

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[4] *See, e.g., Stromback v. New Line Cinema*, 384 F.3d 283, 295 (6th Cir. 2004) (in context of 6th Circuit extrinsic/intrinsic test, "[w]hether expert testimony should be allowed in a particular case remains a matter committed to the discretion of the trial court under Federal Rule of Evidence 702"); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179-80 (9th Cir. 2003) (citing Fed. R. Evid. 702 in finding court's disregard of expert testimony on substantial similarity well within its discretion).

A. Petitioner's Attempt to Label the Circuits as "No Expert" and "Expert Allowed" Does Not Survive Scrutiny

Petitioner claims that the circuits are neatly divided into two camps: those that do not consider expert testimony on the issue of substantial similarity, in particular when determining which parts of the original work are "protectible," and those that do. Petn. 14. Petitioner's categorization is inaccurate and fails to acknowledge that, in the real world, the principles of Fed. R. Evid. 702 determine whether a court draws on the assistance of expert testimony in any particular case.

Perdue's petition for certiorari hinges on his initial proposition that the Second Circuit bars expert testimony to prove substantial similarity. Perdue is wrong. While the Second Circuit considers expert testimony generally unhelpful in assessing the substantial similarity of books, plays and other literary works that are generally well within the court's experience to understand, the Second Circuit generally admits expert testimony where access is an issue and in fact frequently admits expert testimony on substantial similarity in highly technical cases involving computer programming or music. Compare *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947) (no expert assistance necessary to determine substantial similarity of literary works) with *Computer Assocs. Int. v. Altai, Inc.* 982 F.2d 693, 713 (2d Cir. 1992) (expert assistance may be appropriate on substantial similarity in computer cases). Likewise, Perdue claims that the Seventh Circuit is among those circuits that do not admit expert testimony on substantial similarity, citing *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982). But the Seventh Circuit in 2001 affirmed the denial of summary judgment in a case involving complex doll designs in light of

trial testimony that included expert witnesses who testified on substantial similarity. *Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441 (7th Cir. 2001).

On the other side of the coin, Perdue creates his false "split in the circuits" by arguing that the Ninth Circuit regards expert testimony as a central component of its examination of substantial similarity on summary judgment and even requires that summary judgment be denied if an expert submits an affidavit. Here, too, the jurisprudence is far more nuanced. In *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179-80 (9th Cir. 2003), a case involving the alleged infringement of a TV documentary by a video, the Ninth Circuit found no error in the district court's refusal to rely on expert reports on summary judgment because the court had "engaged in an extensive analysis of the alleged similarities in expressive elements" and the court was therefore well within its discretion in disregarding the testimony. *See also, Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (stating only that the extrinsic test "often" requires analytical dissection of a work and expert testimony), *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 2006 U.S.App. LEXIS 22231 (9th Cir. Aug. 30, 2006) (affirming grant of summary judgment to defendants on ground of no substantial similarity, where the court below gave little consideration to the expert report submitted).[5]

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[5] In his discussion of Ninth Circuit law, Perdue makes much of the holding in *Shaw v. Lindheim*, 919 F.3d 1353, 1356-57 (9th Cir. 1990), that satisfaction by the plaintiff of the first part of that circuit's bifurcated substantial similarity test (extrinsic) "creates a triable issue of fact" which precludes summary judgment. Petn. 15-16 & n. 7. Some commentators initially suggested that following *Shaw* there could be no defense summary judgment in such cases because almost any objective expert analysis of substantial similarity testimony would create a disputed issue of fact. Since *Shaw*, however, district courts in the Ninth Circuit frequently have granted defense summary judgments and the

Likewise, Perdue claims that the Sixth Circuit follows the Ninth Circuit and relies on expert testimony on substantial similarity. But, here, too, the lines are not so neatly drawn. The Sixth Circuit has recently held that, as here, when the subject matter involves "a literary work aimed at a general audience, expert testimony will seldom be 'necessary' to determine substantial similarity." *Stromback*, 384 F.3d at 295 (no need to remand for expert testimony in analysis of similarities between poem and movie because admissibility of expert evidence on substantial similarity is at the discretion of the court and this is not a complex case involving a computer program or functional object).

B. Expert Testimony is Admissible on Substantial Similarity When Appropriate

Because the courts below did not exclude the proffered declarations but merely held that they created no genuine issue of fact on the determinative issue of substantial similarity, this case affords no opportunity for this Court to consider the extent to which such evidence can be excluded. But in fact, even if that issue were presented on these facts, courts are in wide agreement that district courts may admit expert testimony in assessing substantial similarity when the expert's scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. As a result, it is common across the circuits for courts to rely on expert testimony in cases involving specialized technology or a specialized audience. *See Kohus v. Mariol*, 328 F.3d 848 (6th Cir. 2003)

Ninth Circuit has routinely affirmed them. *See* M. Nimmer and D. Nimmer on Copyright § 13.03[E][3][b][iv] and *Funky Films, Inc. v. Time Warner Entm't Co., L.P.* 2006 U.S.App. LEXIS 22231 (9th Cir. Aug. 30, 2006). Courts are clearly using judicial discretion to discount, disregard or simply refuse to admit much expert testimony, and, under *Rice*, they are doing so with the approval the Ninth Circuit.

(remanding with suggestion that expert testimony may be necessary to distinguish the protectible elements of a latch subject to industry standards and to interpret technical drawings from a trained engineer's point of view on substantial similarity).

At one end of the spectrum, across the circuits, expert assistance in analysis of substantial similarity is commonly employed in computer cases at the individual discretion of the court. *See, e.g., Computer Assocs. Int'l. v. Altai, Inc.* 982 F.2d 693, 713 (2d Cir. 1992) ("we leave it to the discretion of the district court to decide to what extent, if any, expert opinion, regarding the highly technical nature of computer programs, is warranted in a given case"); *Whelan Assoc., Inc. v. Jaslow Dental lab, Inc.*, 797 F.3d 1222, 1233 (3d Cir. 1986) (expert testimony admissible on substantial similarity in copyright cases "involving exceptionally difficult materials," in that case computer programs); *Stromback v. New Line Cinema*, 384 F.3d 283, 295 (6th Cir. 2004) (expert evidence may be admissible on substantial similarity in computer cases at the discretion of the court); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992) (approving use of experts on objective analysis of substantial similarity to computer programs); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 835 (10th Cir. 1993) (foreseeing extensive use of experts in cases involving computer programs).

Courts throughout the country are also increasingly looking to expert assistance in other complex, specialized areas such as music or architecture. Here, as well, no uniform principles control. Rather, courts of appeals emphasize that the district courts should use their discretion in the given case to determine whether or not the specific facts of the case merit expert intervention. *See Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004) (admitting expert testimony to identify protectible elements of a musical work

and substantial similarity); *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 945 (8th Cir. 1992) (relying on expert testimony in music infringement case); *Johnson v. Gordon*, 409 F.3d 12, 19 (1st Cir. 2005) (same); *Dawson v. Hinshaw Music, Inc.*, 905 F.3d 731, 738 (4th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990) (remanding music infringement case with instructions to take expert testimony on specialized audience if necessary to determine substantial similarity); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1300-1301 (D.C. Cir. 2001) (declining to rule on admissibility of expert testimony for substantial similarity in architectural works case and remanding to district court to develop briefing on issue); *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 05-2866, 2006 U.S. App. LEXIS 21153 at *46 (1st Cir. Aug. 18, 2006) (expert assistance may be appropriate on substantial similarity in complex cases and leaving to the district court on remand whether or not to admit expert testimony on substantial similarity in architectural design case). *See also Boone v. Jackson*, 03 CV 8661, 2005 U.S. Dist. LEXIS 13172 (S.D.N.Y. June 30, 2005) (in granting summary judgment for defendant, district court cites repeatedly to expert testimony on substantial similarity of two rap songs).

Further, several circuits hold that whether or not the subject matter is technical in nature, expert testimony may be appropriate on substantial similarity if the intended audience is specialized. *See, e.g., Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 803 (4th Cir. 2001) (remanding for reevaluation of substantial similarity because the intended audience for a Barney-like character costume is a child, not the adult purchaser of the product); *Kohus v. Mariol*, 328 F.3d 848, 857 (6th Cir. 2003) (expert evidence may be necessary to evaluate response of intended audience of trained engineers).

When, as here, the subject matter is not technical or unduly complex and the intended audience is not specialized, expert testimony on substantial similarity is routinely rejected or accorded little weight, and certainly does not automatically defeat summary judgment, as Petitioner suggests. Thus, it is common for courts across the circuits to not consider or to discount experts in cases involving commonplace literary and visual works directed at lay audiences, such as the popular novels at issue here. *See O'Neill v. Dell Publ'g Co.*, 630 F.2d 685, 690 (1st Cir. 1980) (in comparing two novels, "although we may not be qualified literary critics, we are fitted by training and experience to compare literary works and determine if they evidence substantial similarity"); *Rice*, 330 F.3d at 1180 (9th Cir.) (no error in district court's refusal to rely on expert reports on substantial similarity of video and TV documentary because it had undertaken its own extensive analysis); *Stromback*, 384 F.3d at 295 (6th Cir.) (in analyzing "a literary work aimed at a general audience, expert testimony will seldom be 'necessary' to determine substantial similarity"); *Nelson v. Grisham*, 942 F. Supp. 649, 652-53 (D.D.C. 1996) (discounting expert analysis on substantial similarity of two books because the books themselves are the only relevant evidence), *aff'd*, 132 F.3d 1481 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998); *Kay Berry Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199 (3d Cir. 2005) (illicit copying or unlawful appropriation decided without aid of experts). This reluctance to rely on experts comports with the notion that the court is supposed to be analyzing the works from the perspective of the "ordinary person."[6]

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[6] *See also, e.g., Sahuc v. Tucker*, 300 F. Supp.2d 461, 465, n. 1 (E.D. La. 2004) (admitting plaintiff's expert testimony on substantial similarity of photographs but giving it "little weight" because of the layperson standard); *Gentieu v. Tony Stone Images/Chicago, Inc.*, 225 F.

Finally, suggesting that courts are incapable of making such judgments on their own, Perdue argues that courts should give substantial weight to expert testimony on one particular aspect of the substantial similarity analysis for literary works, namely the court's identification of unprotectible elements such as stock themes, scenes à faire, and historical facts or theories. But it is widely recognized to be within a court's ken to determine, for example, that a murder at the beginning of a mystery is a stock element or that historical facts concerning Emperor Constantine and the Nicaean Conference are not protectible. Indeed, courts across the circuits routinely decide that a wide range of allegedly infringing elements constitute stock themes or scenes à faire without relying upon expert testimony. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50-51 (2d Cir. 1986) (finding that "drunks prostitutes, vermin and derelict cars" are scenes à faire for book about the Bronx); *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 319-20, 325 (6th Cir. 2004), *cert. denied*, 543 U.S. 959 (discounting expert testimony regarding poem and determining that alleged similarities were stock themes and scenes à faire that were "ubiquitous in literature and the cinema"); *Rice*, 330 F.3d at 1180 (9th Cir.) (approving

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Supp.2d 838, 855 n. 14 (N.D. Ill. 2003) (admitting expert testimony on substantial similarity of photographs, despite a lack of technical complexity; "expert testimony on substantial similarity is not impermissible as such" but it "cannot create material factual issues where they conflict with the controlling 'total concept and feel' standard"); *Rice v. Fox Broad. Co.*, 148 F. Supp.2d 1029, 1055 n. 23 (C.D. Cal. 2001) (stating that it did not rely on expert affidavits on protectible elements because neither were "very relevant"), *aff'd*, 330 F.3d 1170 (9th Cir. 2003).

determination of scenes à faire in video of magic tricks when district court refused to rely on proffered expert testimony).[7]

Likewise, courts in many circuits routinely separate out unprotectible facts or factual theories without relying on expert testimony. *See, e.g., Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980), *cert. denied*, 499 U.S. 841 (1980) (no use of expert testimony in finding historical facts concerning the explosion of the Hindenberg airship not protectible); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1179-80 (C.D. Ca, 2001), *aff'd*, 90 Fed. Appx. 496, 498 (9th Cir. 2003) (refusing to use expert testimony on summary judgment in separating out as unprotectible the facts of plaintiff's life in works of fiction and non-fiction); *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1261 (11th Cir. 1999) (no use of experts in finding that information in novel about black Seminoles warriors is unprotectible historic fact).

* * * * *

In short, Perdue is wrong on every count when he claims to identify a conflict between the circuits which is "well-established, shows no sign of diminishing, and affects the outcome in any case in which substantial similarity is the sole issue." Petn. 18. There is no such conflict requiring this Court's attention. Any differences do not break down neatly into the kind of bright-line division between "no expert" and "expert allowed" circuits that Perdue proposes. Rather,

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[7] *See also Nelson v. Grisham*, 942 F. Supp. at 653 (D.C.) (disregarding expert affidavits and deciding for itself what similarities were actually scenes à faire); *Ty, Inc. v. GMA Accessories, Inc.*, 959 F. Supp. 936, 941-42 (N.D. Ill. 1997) (analyzing animal duffle bags and rejecting expert assistance in removing aspects of the works that are not required by a depiction of the animal), citing *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502 (7th Cir. 1994).

consistent with Rule 702, courts continue to exercise discretion in determining whether to admit and rely on expert testimony in the analysis of works for substantial similarity, and do not find that the mere proffer of an opposing "expert affidavit" requires denial of summary judgment otherwise due for lack of substantial similarity.

The operative consideration is whether expert testimony will be helpful to the court. Under that standard, courts rely on expert testimony on complex subjects, but remain understandably reluctant to admit expert testimony on substantial similarity of literary works, especially popular fiction. Even if admitted, there is likewise no bright line rule, as Perdue suggests, that would dictate the denial of summary judgment simply because an expert has weighed in. At bottom, the role and import of expert testimony in a copyright case is decided on a case-by-case basis. Because of that discretion, no copyright plaintiff can predict the outcome of his suit based on the circuit he files in.

The consequence of Perdue's proposal is clear: to defeat summary judgment in a copyright infringement case, all one would need to do is to hire a so-called "expert" to submit an affidavit claiming substantial similarity of protectible expression between the works at issue. Under a *per se* rule requiring the denial of summary judgment whenever a paid expert opines on the issue of substantial similarity, district courts would be stripped of their authority under the Federal Rules of Civil Procedure to consider whether an affidavit creates a "genuine issue" of material fact requiring a trial of a copyright infringement claim (Rule 56(c)), the gatekeeper function of the district courts would be vitiated in its entirety, and the floodgates would be open to meritless copyright infringement cases which ought never reach a jury.

II. A GRANT OF THE WRIT OF CERTIORARI IS NOT APPROPRIATE BECAUSE THE EXPERT DECLARATIONS DID NOT RAISE ANY ISSUES OF FACT PRECLUDING SUMMARY JUDGMENT

Petitioner conclusorily asserts that his expert declarations created genuine issues of fact because they "contradicted the court's assumptions about history, about literature, about the genre, and about which scenes and devices were stock." Petn. 7. Yet, far from explicating why certain elements should not be considered "facts" or "stock elements," the expert declarations did nothing more than create laundry lists of supposed similarities – virtually the same supposed similarities proffered by Perdue in opposition to the motion that were expressly considered by the court. Instead of creating an issue of fact, the court concluded that these elements did not make the works substantially similar and "any slightly similar elements are on the level of generalized or otherwise unprotected ideas." Petn. App. 35a. In sum, the district court acted well within its discretion under Fed. R. Evid. 702 in concluding that the two expert declarations proffered by Perdue were not "determinative" of the substantial similarity analysis.

A. The District Court was Entirely Capable of Determining Substantial Similarity in This Literary Case

Expert testimony was hardly necessary for the court to compare *Da Vinci Code* and *Daughter* and to apply the substantial similarity analysis. The works at issue are literary works; indeed, they are popular thrillers aimed at lay audiences – not computer programs or other complex subject matters beyond the understanding of a district judge. *See O'Neill v. Dell Publ'g Co.*, 630 F.2d 685, 690 (1st Cir. 1980) (in comparing two novels, "although we may not be qualified literary critics, we are fitted by training and

experience to compare literary works and determine if they evidence substantial similarity"). This was hardly a case of complex analysis in a complex medium. The intended audience of the works is neither specialized nor technically savvy. Consistent with countless similar claims, the district court engaged in a thorough side-by-side analysis of the works themselves and found no actionable similarity. A three judge panel of the Second Circuit, reviewing *de novo,* agreed.

Contrary to Perdue's claims, the court was quite capable of listening to the parties' arguments and evaluating the literary works to filter out scenes à faire, unprotectible ideas, and factual material as part of its substantial similarity analysis. The district court's conclusion that certain, largely abstract, elements in both works were scenes à faire was hardly a reach. Petn. App. 22a. It was well within the district court's purview to conclude, for example, that it is common in thrillers to have a murder at the beginning of the novel or to have story lines such as "two organizations or people who would stop at nothing, including murder, to obtain physical evidence," or that "the hero and heroine became unwilling participants in the struggle between the competitors to obtain the physical evidence." Petn. App. 22a. Nor was the district court out of its depth in finding unprotectible such banal themes as "the wolf in sheep's clothing," the theme that "history is relative and is controlled by victors, not losers," and the theme that "through [the union of hero and heroine], they become much more than the sum of their parts." It was not the failure to adequately consider his expert reports that doomed Perdue's claim. Perdue's copyright claim failed because no fact finder could find that his unique *expression* of these ideas, themes and story lines were copied.

Courts have routinely identified ideas and scenes à faire on the basis of no more than their own personal knowledge.

See, e.g., Williams v. Crichton, 84 F.3d 581, 589 (2d Cir. 1996) (finding without expert evidence that "electrified fences, automated tours, dinosaur nurseries, and uniformed workers" are all "classic scenes à faire that flow from the uncopyrightable concept of a dinosaur zoo"); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50-51 (2d Cir. 1986) (finding that "drunks prostitutes, vermin and derelict cars" are scenes à faire for book about the Bronx); *Berkic v. Crichton*, 761 F.2d 1289, 1293-94 (9th Cir. 1985) ("depictions of the small miseries of domestic life, romantic frolics at the beach, and conflicts between ambitious young people on the one hand, and conservative or evil bureaucracies on the other" unprotectible as scenes à faire in novel about young couple); *Evans v. Wallace Berrie & Co., Inc.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988) (finding that "sand dollar as currency, foods made of seaweed, seahorses for transportation and plates made of oyster or mother of pearl are not protected similarities of expression, but . ... naturally follow from the common theme of an underwater civilization").

Likewise, the district court hardly needed expert testimony to determine that much of the allegedly infringing material were religious and historical facts or theories. Perdue *admitted* that conclusion and nothing in his expert reports contradicted it. Indeed, as the district court noted, in Perdue's own Author's Note, he stated that, "[t]his is a work of fiction based on fact . . . The sections of this book dealing with the Nicaean Conference and the events and religious controversies leading up to it are true and far better documented than the scriptures in the Hebrew or Christian bible or the Muslim Koran." Petn. App. 25a. Perdue also conceded, again noted by the district court, that "[m]uch of his research [about the sacred feminine and the Great Goddess] involved the Gnostic Gospels...and works

commenting upon those Gospels."[8] Petn. App. 25a. In short, the court did not take any evidentiary leap of faith in concluding that these facts and theories were unprotected. Indeed, "the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980).

Finally, the district court played its traditional role in determining that most of the alleged similarities were merely abstract ideas. Thus, for example, Perdue's petition emphasizes that Professor Goshgarian testified that, to his knowledge, only two mystery thrillers – namely *Da Vinci Code* and *Daughter* – have the theme that evidence of the divine feminine exists which is a threat to the Catholic church. Petn. 8. Yet, even if true, such expert testimony was simply irrelevant since the shared similarity is only an abstract idea, not protectible expression, and, as the district court detailed at length, the expression of the idea of the divine feminine in each work is radically different. In sum, the district court did not require an expert to properly strip away stock themes and storylines or factual theories, or to readily conclude that the expression of abstract similarities identified by Perdue were dramatically different in each work.

B. The Declarations Added or Changed Nothing in the Court's Analysis

Perdue's expert reports raised no issues of fact for the simple reason that the district court made extensive findings

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[8] Also in the record were excerpts from one of the most well-known historical non-fiction works commenting on the Gnostic Gospels; a work that Perdue acknowledged he relied on. Civ. App. 102-117.

on exactly the same elements that Perdue's experts claimed to analyze. Thus, for example, Goshgarian argued that the *Da Vinci Code* and *Daughter* were "suspiciously similar"[9] because both novels share a "secret sacred female" who was wronged by the Church, both have opening murders involving an "older art-expert male with a big secret," and both involve a "gold key hidden in a key painting." Cir. App. 294-98. Yet, each of these supposed similarities (and others he cites) were considered by the court and found to be either outright false – for example, *Daughter* does *not* include a gold key, but only a gold ingot embossed with a swastika and Herman Goering's account number – or merely abstract ideas (like the divine feminine) that cease to be similar once the actual expression of the respective novels is considered. Petn. App. 23a n. 7.; 24a, 26a-27a.

The district court was not aided by Olssen's laundry lists and charts supposedly documenting similarities in the works.

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[9] Goshgarian, not a lawyer, relies on the wrong legal standard, looking to whether the works contain "suspicious similarities" rather than "substantial similarities." Cir. App. 297-98. Olssen's declaration was hopelessly muddled and confusing. It purports to compare *Legacy, Daughter* and *Da Vinci Code* but provides virtually no page references to identify the alleged similarities. Thus, one has no means to verify the accuracy of his contentions and no means to discern whether he is plucking a supposed element from *Legacy* or *Daughter* when he contends that a similar feature appears in *Da Vinci Code*. As recognized by numerous courts, a judge is better off comparing the actual works than relying on random lists put together by experts or advocates. *Williams v. Crichton*, 84 F.3d 581, 590, (2d Cir. 1996) (rejecting plaintiff's list of similarities between two books because such lists are "'inherently subjective and unreliable,' particularly where 'the list emphasizes random similarities scattered throughout the works,'" quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985)); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 52 (2d Cir. 1986) (the "works themselves supersede and control contrary descriptions of them" so that each film "was the best and most relevant evidence on substantial similarity").

The "similarities" identified in Olssen's declaration are virtually identical to those identified by Perdue in his motion and expressly considered by the district court. (Compare Petn. App. 20a – 33a with Civ. App. 310-322). To cite but one example: Olssen's attempt to cite similarities in the characters in the novels was thoroughly debunked by the district court. In detail the court considers and rejects, in turn, any similarity between *Da Vinci Code*'s heroes and heroines, Robert Langdon and Sophie Neveu, and *Daughter*'s Seth and Zoe Ridgeway, or the novel's entirely distinct villains. Petn. App. 30a-32a.

In sum, the two expert reports proffered by Perdue did not provide any evidence that was not considered in some way by the courts below and most certainly provided no basis to disturb the thorough and well-reasoned grant of summary judgment.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

LEWIS PERDUE,

Petitioner,

—v.—

DAN BROWN and RANDOM HOUSE, INC., IMAGINE FILMS ENTERTAINMENT, LLC, SONY PICTURES RELEASING CORPORATION, SONY PICTURES ENTERTAINMENT, INC. and COLUMBIA PICTURES INDUSTRIES, INC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTRODUCTION

The problem here is that the "No Expert" Circuits do *not* engage in balancing nor do they discuss Fed. R. Evid. 702. Instead, they uniformly hold that expert testimony concerning substantial similarity in literary works is legally *irrelevant* and so cannot be considered. None of the cases from those Circuits cited in the Brief in Opposition engages in balancing, except for one technology case.

That is the split. Those Circuits do not balance while others do. Both courts and treatise writers have recognized this split. The Brief in Opposition misrepresents the cases in order to discern a false uniformity that no court or treatise has ever before detected.

The "No Expert" Circuits wrongly call expert testimony irrelevant in literary cases like this one for several reasons. First, they say their "lay observer" test is unsuited for expert testimony. Second, they give judges the power to put themselves in the place of the lay observer and to decide questions of genre, fact versus fiction, stock themes and stock scenes as if they were questions of law rather than fact. As the Respondents' Brief in Opposition at 16, 20-21 argues, they say expert testimony should be excluded because judges "are fitted by training and experience to examine literary works," *quoting O'Neill v. Dell Publishing Co.*, 630 F.2d 685, 690 (1st Cir. 1980). *See also* Opposition at 2 ("district court more than competent"). Or they dismiss lists of similarities compiled by experts but then rely on lists of their own.[1]

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[1] While the Second Circuit has condemned such lists, *Litchfield v. Spielberg*, 736 F.2d 1356 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) does not condemn them. It says though lists can be subjective and unreliable the court has "relied on such lists of similarities in the past".

It makes no difference that they sometimes treat technology cases differently because, even when they do, they carefully limit the technology decisions so the holdings do not apply to literary or other types of cases. *See e.g., Computer Associates Intern., Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992).

This case dramatically demonstrates why that logic is wrong. Here, the expert affidavits materially differed from the district court's findings concerning genre, what is fact or fiction, stock themes, stock devices, timing and the unusual relevance of the characters' names. A comparison between Petn. at 7-12 and Petn. App. at 22a-35a and Opposition at 23-25 shows this.

The only way the district court could find no genuine issue of material fact was by ignoring the affidavit testimony, i.e., treating it as irrelevant. It simply did not consider that Constantine's alleged persecution of the divine feminine was fiction, not fact, or that the unique themes and scenes were not found elsewhere and were not required by the basic idea, or that specific plot elements appear at the same places in the two novels. Neither the district court nor Random House addresses any of these. Yet they should be "determinative."

Copyright law should not depend on the Circuit in which a case is filed. The expert testimony would have been admitted in Los Angeles but it was deemed irrelevant here. That is why Random House took the offensive and sued Perdue in New York. This Court should adopt a national rule that allows consideration of expert testimony throughout the country.

This Court should grant certiorari, entertain briefing and argument, and reverse the decision below.

STATEMENT OF THE CASE

Proceedings below. In the lower courts, Perdue consistently maintained the affidavits were relevant, admissible, and created genuine issues of material fact.[2] That he also said he should win without them does not matter, given the existing state of Second Circuit law. Opposition at 6.

More importantly, Random House consistently argued that the expert affidavits were irrelevant.

In the district court, it said: "The one thing that should not be given *any* weight on this motion is the testimony of Perdue's so called experts." Reply Memorandum of Law In Support of Plaintiff's Motion for Summary Judgment, 23-24.

In the Second Circuit, Random House said: "Where issue is substantial similarity expert's affidavit *is not properly considered.*" Brief for Plaintiffs-Counter-Defendants-Appellees and Counter-Defendants-Appellees, 54 (emphasis added).

This conflicts with the rule in the "Expert Allowed" Circuits, i.e., the Ninth, Fourth, Sixth, Eighth, and Eleventh Circuits.

Statement of Facts. Random House does not dispute Perdue's description of the record facts. Nor does it deny the similarities between the works. Petn at 7-12. It matters not that there are dissimilarities. In order for Perdue to go to the jury, all he has to establish is that a reasonable juror, viewing the facts in his favor, could find that Brown copied a portion of the plot expression in DAUGHTER OF GOD that was of substantial value to both works. *See* Petn. at 3-7.

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[2] *See* Petn. at 7 n.4.

Random House makes a significant factual error. That error demonstrates the usefulness of expert affidavits as an antidote to lawyer error. Random House wrongly attacks one of the affidavits for saying that in both books there is a gold key that does not turn a lock. Opposition at 6 n.2, 24. The expert is right and Random House is wrong.

In DAUGHTER OF GOD, as in THE DAVINCI CODE, a murdered art expert leaves a painting named for the Madonna in which a gold bar is hidden. In both novels, when the bar slides into a slot, it allows access to historical evidence. DAUGHTER at 367-368. DAVINCI at 177-178. So in both books the gold bar is a "key" that works without being turned. Random House misled the district court on this point. *See* Petn. App. 23a n.7. If the Court had honored the affidavits, this would not have happened.

Random House also incorrectly accuses Professor Olsson of failing to give any page cites. But Petn. at 10-11 shows this is untrue, because it quotes his page cites.

Finally, Perdue's ambiguous statement in DAUGHTER concerning the factual nature of his book is itself a device as old as the English novel. *See* D. Defoe, ADVENTURES OF ROBINSON CRUSOE, MARINER OF YORK (1719).

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. The conflict is between Circuits that say expert testimony is "irrelevant" to substantial similarity, and those who say it can be both relevant and admissible.

Random House does not dispute that treatises and Circuit Courts say there is a conflict among the Circuits. *See* Petn. at 13-14. Nor does it even examine most of the cases that demonstrate that conflict. Petn. at 13-19.

Instead, it wrongly claims all courts simply exercise their discretion under Fed. R. Evid. 702 to determine whether expert testimony is admissible in each case. But most of the cases it cites come from "Expert Allowed" Circuits, and the other cases cited fail to support its argument.

The "No Expert" cases cited at Petn. 14-15 hold that expert testimony is unequivocally "irrelevant." For the Court's convenience, the quotations from those cases which express the "irrelevance" rule are collected here, with footnotes addressing the additional cases Random House has cited from the "No Expert" Circuits.

Second Circuit. The court still adheres to the pre-Rule 702 standard laid down in *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946):

> If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue . . . the test is the response of the ordinary lay hearer; accordingly, on that issue, 'dissection' and expert testimony are irrelevant"

Id. at 468 (footnote omitted). *See also Computer Associates Intern., Inc. v. Altai*, 982 F.2d 693, 713 (2d Cir.

1992) ("expert testimony is . . . 'irrelevant' and not admitted"); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 51 (2d Cir. 1985) ("some confusion surrounds the standard to be applied" but Second Circuit follows *Arnstein*, not [the Ninth Circuit]).[3]

First Circuit. Segrets, Inc. v. Gillman Knitwear Co., 207 F.3d 56, 66 n.11 (1st Cir. 2000) ("we reiterate our rule that expert testimony on the topic of 'substantial similarity' is not permissible").[4] The Opposition cites *O'Neill v. Dell Publishing Co.*, 630 F.2d 685, 690 (1st Cir. 1980) for exactly the proposition other Circuits reject, i.e., that expert testimony should be excluded because judges "are fitted by training and experience to examine literary works."

Third Circuit. Kay Berry Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 208 (3d Cir. 2005) ("the fact-finder must decide without the aid of expert testimony . . . whether the copying is 'illicit' or 'an unlawful appropriation' " (citation omitted)); *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62, 66 (3d Cir. 1978) (expert testimony "irrelevant when the issue turns to unlawful appropriation").[5]

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[3] Two other Second Circuit cases the Opposition at 18,22 cites do not involve expert testimony. *See Hoehling v. Universal City Studios*, 618 F.2d 972 (2d Cir. 1980) *cert. denied*, 449 US. 841 (1980) (no expert testimony offered); *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996) (no expert testimony offered).

[4] The Opposition correctly says that *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 116 (1st Cir. 2006) has softened the *Segrets* rule, but it did so only for "areas of technology". In *Johnson v. Gordon*, 409 F.3d 12 (1st Cir. 2005), a music case, both sides used experts without objection.

[5] In *Whelan Assocs. Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), a computer program case, both sides relied on expert testimony and its admissibility was not an issue.

Fifth Circuit. Positively Black Talk, Inc. v Cash Money Records, Inc., 394 F.3d 357, 374 (5th Cir. 2004) (Fifth Circuit does not follow Ninth Circuit): *Sahuc v. Tucker*, 300 F. Supp. 2d 461, 465 n.1 (E.D. La. 2004) (because standard is layperson standard, expert testimony is to be given "little weight").

Seventh Circuit. Atari, Inc. v. North American Philips Consumer Electronics Corp, 672 F.2d 607, 614 (7th Cir. 1982) (substantial similarity test does not involve analytic dissection and expert testimony, quoting *Arnstein*).[6]

Federal Court of Claims. Trek Leasing, Inc. v. United States, 66 Fed. Cl. 8, 18 (Ct. Cl. 2005) ("[s]ince the ordinary observer test is an objective one, expert testimony may not be used to determine substantial similarity.").

With only one exception for computers, these cases *never mention* Fed. R. Evid. 702. Their conclusion that expert testimony is irrelevant forecloses all further inquiry. That exception proves the rule. In *Computer Associates Intern, supra,* the Second Circuit said that in a computer design case it would allow expert testimony because of technical issues. But said its ruling would not apply to literary works because of the "well-established general rule in this [C]ircuit." *Id.* at 713.

The Random House brief does not offer any hope that the Second Circuit or other Circuits will abandon this analysis. It cites no case in which the Second Circuit has denied summary judgment on substantial similarity

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[6] The Opposition cites *Susan Wakeen Doll Co. v. Ashton-Drake Galleries*, 272 F.3d 441 (7th Cir. 2001), but there both sides used experts on doll construction without objection. In *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502 (7th Cir. 1994), no experts were offered. In *Gaste Matieu v. Tony Stone Images/Chicago Inc.*, 255 F.Supp.2d 838, 855 n.14 (N.D. Ill. 2003) the court said expert testimony "cannot create material factual issues."

because of an expert affidavit. To the contrary, the rule in the Second Circuit is so "well-established" that it has all but quit publishing its substantial similarity decisions. *See* U.S.Ct. of App. 2nd Cir. § 0.23, 28 U.S.C.A.[7]

That the cases from the "Expert Allowed" Circuits exercise discretion when admitting expert testimony is predictable, and in no way diminishes the conflict.[8]

2. If considered, Perdue's expert affidavits create genuine issues of material fact for a jury to resolve.

A court reviews summary judgment decisions as a matter of law. The facts are to viewed in the light most favorable to the non-moving party, i.e. Perdue. *See* Petn at 12. A court commits error if it grants summary judgment where there is a genuine issue of material fact. Fed. R. Civ. P. 56.

The purpose of the "substantial similarity" test is to protect original expression that makes a material contribution to both works. In *Feist Publications, Inc. v. Rural Telephone Service*, 499 U.S. 340, 348 (1991), this Court held that even an arrangement of unprotected facts would itself be protected if there were a "minimal degree of creativity" in the arrangement. The question is whether the defendant has taken "material of substance

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[7] *Hudson v. Imagine Entertainment Corp.*, 128 Fed. Appx. 178 (2d Cir. 2005); *Kroencke v. General Motors Corp.*, 99 Fed. Appx. 339 (2d Cir. 2004); *Scholastic Inc v. Staffer*, 81 Fed. Appx. 396 (2d Cir. 2003).

[8] *Ninth Circuit. Funky Films, Inc. v. Time Warner Entertainment Co.*, 462 F.3d 1072 (9th Cir. 2006) (expert testimony presented but given little weight); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1179-80 (9th Cir. 2003) (court balances and finds experts from both sides are not helpful); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000) (expert testimony "often" needed); *Brown Bag Software v.*

and value" from the plaintiff's work. *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1288 (10th Cir. 1996). Where actual copying is shown or admitted, the standard for "substantial similarity" is lower. *See Swirsky v. Carey*, 376 F.3d 841,844 (9th Cir. 2004) (reversing summary judgment). Even if the copied portion is relatively small in proportion to the entire work, if qualitatively important, the finder of fact may find substantial similarity. *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987) (reversing summary judgment).

A jury is the body to decide disputed issues of material fact in copyright disputes. *Fellner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

The Opposition completely discards its burden to view the facts in the light most favorable to Perdue. Its vehement denial that the gold piece in each novel is a "key" is but one example.

As the Petition at 7-12 demonstrates, the affidavits from literary experts conflict with the district court's findings on every issue the Opposition deems important. Its footnoted claim that Perdue "admits" the affidavits add nothing reflects bold but entirely wishful thinking. Opposition at 6 n.3. A reasonable juror could believe, based on the affidavits, that Brown copied Perdue's fiction concerning Constantine's persecution of women. Such a juror could find that not only is the idea of both

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Symantic Corp., 960 F.2d 1465, 1474 (9th Cir. 1992) ("expert opinion is relevant"); *Berkick v. Crichton*, 761 F.2d 1289 (9th Cir. 1985) (expert testimony allowed).

Fourth Circuit. Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 803 (4th Cir. 2001) (discusses "intended audience" standard).

Tenth Circuit. Gates Rubber Co. v. Bando Chem. Indus. Ltd., 9 F.3d 823, 835 (10th Cir. 1993) (expert testimony "would provide substantial guidance").

novels—suppression of evidence of the divine feminine that threatens the Catholic Church—original to Perdue, but that Brown took numerous important plot elements from Perdue and that these elements were not "stock," e.g. the "idea" did not require that a message be left in a painting containing a gold bar that worked as a key.

In short, a reasonable juror could find that Brown took "material of substance and value" from Perdue's novel, and that he owes Perdue compensation to the extent he did that.

In sum, the Circuits are not just in conflict. They are in deadlock. The issue is important both to literary America as well as to the administration of the federal Copyright Act. The United States needs a uniform rule. This Court should give it one.

CONCLUSION

For these reasons, petitioner Perdue prays that this Court will grant the petition, reverse the Second Circuit, and remand for further consistent proceedings.

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